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A TREATISE
ON
THE LAW OF JUDGMENTS

INCLUDING THE DOCTRINE OF RES JUDICATA

By HENRY CAMPBELL BLACK, M. A.

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IN TWO VOLUMES

VOLUME I

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PREFACE.

THE work now given to the public is one which has engaged the author's study and reflection, more or less constantly, for a considerable number of years. The magnitude and importance of the subject are such as to demand the most patient and exhaustive research, the most careful collation and weighing of authorities, and the most impartial and reasonable discussion of its disputed points, on the part of any one who attempts a comprehensive and systematic treatment of it. How far the author has fallen short of the fulfillment of these conditions, is for the judgment of those who shall use the book. But the fact that he has constantly kept this ideal in mind, and devoted his best energies to the realization of it, is his justification for the hope that the following pages may be found to possess some interest and value for his brethren of the bar.

The law of judgments, at the present day, aside from local variations in matters of practice, may be regarded as tolerably well settled. There are, however, certain branches of the law of estoppel by record which still present themselves to many a puzzled inquirer as a labyrinthine confusion of apparently irreconcilable decisions. This arises, not so much from any real contradiction or obscurity in the authorities, as from the infinite variety exhibited in the facts of the different cases and the necessity of making nice discriminations in the principles to be applied. At such places, the endeavor has been made to exhibit the result of the decisions in a clear and orderly form, by a methodical classification of the cases, and by a logical and systematic arrangement of topics. In illustration we refer to the discussion of the doctrine of merger as applied to inseverable claims founded in contract or tort, actions for continuing damages, for distinct trespasses, for causes of action distinct though founded on the same transaction, for permanent and recurring nuisances, for periodical liabilities, etc. (vol. ii. §§ 731-753). Nor is our general subject wholly free from vexed questions, upon which the authorities are hopelessly at war. In such cases it has been the author's task to weigh and balance the conflicting decisions,—not withholding criticism where he deemed it justified, nor refraining from the positive expression of

individual opinion,—and to present what he considered the true rule, or the best rule, or the rule sustained by the preponderance of authorities, supporting his conclusions as well by the reasoning suggested by his own reflections on the subject, as by quotations from the opinions of the courts. Examples of such topics, so treated, may be seen in the discussion of “judgments as contracts” (vol. i. §§ 7–11), the definition of jurisdiction (§ 215), the question of the collateral impeachment of judgments for want of jurisdiction (§§ 270–276), the subject of the conclusiveness of foreign judgments *in personam* (vol. ii. §§ 825–834), and the matter of jurisdictional inquiries in actions on judgments from a sister state (§§ 894–915) and the plea of fraud (§§ 916–921).

Throughout the work an attempt has been made to preserve an orderly and scientific arrangement, both in the main divisions of the subject and in the sequence of parts and sections within each chapter. Such a plan, it is believed, if perfectly carried out, would greatly facilitate the use of a text-book so voluminous as the present. As to the method of using the authorities, it may be observed that quotations from the opinions of the courts have been quite freely introduced,—not, it is hoped, to the extent of incumbering the pages with needless repetitions, but for the purpose of illustrating and re-inforcing the legal propositions stated by the apt and convincing remarks of learned judges. For the rest, the citations will be found to cover the English and Canadian reports, as well as those of all the American states, with occasional illustrations from the Roman law and other foreign systems. The extent of the author's researches will be apparent from the fact that more than ten thousand cases are cited in these volumes. But he feels confident that to refer to a profusion of authorities is to err (if at all) on the side most easily pardonable by the profession.

In view of the wide circulation of the various periodicals constituting the National Reporter System, it was thought that convenience in the use of the book would be greatly promoted by introducing parallel references in the case of all decisions reported concurrently in an official series and in one of the Reporters. And this has accordingly been done. Where a case is cited from one of the Reporters alone, it is because it was omitted from the official series of reports or has not yet been reached by that series. For reasons similar to the foregoing, parallel references to the American Decisions and the American Reports have been introduced. The citations have been brought down to the time the work goes to press.

H. C. B.

WASHINGTON, D. C., January 1, 1891.

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THE LAW OF JUDGMENTS.

CHAPTER I.

THE NATURE AND CLASSIFICATION OF JUDGMENTS AND DECREES.

PART I. THE NATURE OF JUDGMENTS.

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PART I. THE NATURE OF JUDGMENTS.

§ 1. Definitions of Judgments, Decrees, and Orders.

As, in logic, judgment is an affirmation of a relation between a particular predicate and a particular subject, so, in law, it is the affirmation by the law of the legal consequences attending a proved or admitted state of facts. It is not, however, a mere assertion of

the rules of law as applied to given conditions, nor of the legal relations of the persons concerned. It is always a declaration that a liability, recognized as within the jural sphere, does or does not exist. An action is instituted for the enforcement of a right or the redress of an injury. Hence a judgment, as the culmination of the action, declares the existence of the right, recognizes the commission of the injury, or negatives the allegation of one or the other. But as no right can exist without a correlative duty, nor any invasion of it without a corresponding obligation to make amends, the judgment necessarily affirms, or else denies, that such a duty or such a liability rests upon the person against whom the aid of the law is invoked. Further, a judgment is properly neither hortatory nor imperative. It does not advise or recommend, nor, on the other hand, does it prescribe any act or course of conduct. In respect to the latter particular the case is different, of course, with a decree in equity, but we are now using the term "judgment" in its narrowest sense. In general, therefore, it neither counsels nor commands, but simply asserts. Again, although it is the affirmation of the law, it is necessarily pronounced by the mouth of a court or judge. And the decision of any arbiter, self-constituted or chosen by the litigants, is no judgment. The law speaks only by its appointed organs. It is only when the deliverance comes from a true and competent court that it is entitled to be called a judgment. Finally it must be responsive to the state of facts laid before the tribunal. It is elementary law that no court can travel outside the controversy presented to it, to touch other rights or relations not involved. Hence the judgment must be an affirmation in regard to the matters submitted to the court for decision. We may therefore define a judgment as the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist.¹

¹ "A judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it." *Whitwell v. Em-*

ory, 8 Mich. 84, 59 Am. Dec. 220. "The decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings

This is the definition of a judgment in its narrow and technical sense; that is, as it is understood at common law, as distinguished from the modified significance of the term as used in the codes of procedure, and also as distinguished from the definitive sentences of courts of equity, admiralty, arbitration, and others.¹ The term which, in equity practice, corresponds to judgment at common law is *decree*. But there are important differences between judgments and decrees, such as to require a distinct definition of the latter; and these we now proceed to consider.

A decree, then, is the determination, sentence, or judgment of equity, pronounced by a competent court, upon the controversy submitted for its decision. Or more specifically, it is "a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties in the suit according to equity and good conscience."² But a decree differs from a judgment both in the process which precedes and determines it and in its contents. Aside from the differences in the courts,—in their organization, process, remedial machinery, rules and methods of investigation, principles of decision, and the scope of their competence,—it is to be noted that while a judgment at law is usually, at least in contested cases, determined by the verdict, the conclusion of law following inevitably as soon as the facts are found, a judge in equity is called upon to decide upon the whole merits of the controversy as it addresses itself to his conscience and sense of fairness, of course within the established rules of equity. Hence while a decree

instituted therein for the redress of an injury." Bouvier's Law Dict. *voc. Judgment*. "The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit." 2 Tidd's Prac. 980. "A judgment is the determination of the law as the result of proceedings instituted in a court of justice. A final judgment is such as at once puts an end to the action, by determining that the plaintiff is or is not entitled to recover, and the amount in debt or damages to be re-

covered." Thompson, J., in *Mahoning Bank's Appeal*, 82 Pa. St. 160.

¹ A judicial sentence may be designated by a different term than judgment. In the case of *Cooper v. Metzger*, 74 Ind. 544, it was held that the words "final adjustment," as used in a statute, were equivalent in meaning to "final judgment."

² 2 Daniel, Ch. Prac. 986. "A decree in chancery is the judgment of the chancellor upon the facts ascertained and should be signed by him and entered on the minutes of the court." Code Ga. § 4212.

is, equally with a judgment, the deliverance of the *law*, it is also, to a considerable degree, the decision of the *man* who frames it, as the interpreter of that moral standard which equity sets up. Another important particular in which they differ is that a decree is more pliable than a judgment. The latter proceeds upon the determination of a narrow issue, of law or fact, and merely decides upon the existence of an alleged liability as between two contending persons or groups of persons. A decree may be adjusted to meet all the exigencies of the litigation, and to settle all the conflicting rights and claims, however numerous and complicated may be the interests involved. Further, a judgment has in general nothing whatever to do with the means of enforcing the liability which it declares. Certain consequences do indeed flow from it,—as the right to issue execution, the attaching of a lien upon land,—but these are no part of the judgment, nor is it concerned with directions for making its sanction effective. It is, as already stated, a bare assertion. On the other hand, a decree may, and frequently does, contain more or less minute and specific directions for effectuating its object. Also it may prescribe or forbid a specific act or course of conduct, which a judgment never does. Hence it will be perceived that the *orbit* of a decree in chancery, so to speak, is much wider than that of a judgment at law.

This distinction between decrees and judgments has not always been strictly preserved in American practice. In some of the states there is a sort of border-land where equitable relief is administered through common law forms, the amalgamation having transpired through the lack of separate chancery courts. Thus in Pennsylvania, where an action of ejectment may be brought to enforce the specific performance of a contract for the sale of land, the sentence pronounced is not regarded as an ordinary judgment at law, but as containing the substance of a decree in equity, since it directs the payment of money by one party and the conveyance of the land by the other.⁴

In those states which have adopted codes of reformed procedure,

⁴Coughanour v. Bloodgood, 27 Pa. St. 285.

all distinction between law and equity, so far as relates to pleading and practice, is abolished, and of course the difference between judgments and decrees is also swept away. There being but one form of civil action, the plaintiff may ask therein for any relief which either law or equity would accord him, and the decision in his favor may award him damages, specific performance, an injunction, foreclosure of a mortgage, or any other legal remedy. Hence the final determination of *any* suit, whether by the proceedings formerly known as equity, or at common law, is, under these codes, a judgment.⁵ The most usual definition is "the final determination of the rights of the parties in an action or proceeding."⁶ And the term "decree" is no longer used, except colloquially. It will be observed that the definition quoted, while it enlarges the scope of the word by making it include decisions which were not formerly called judgments but decrees, also restricts it by the exclusion of those determinations which are elsewhere known as interlocutory judgments.

It is also necessary to distinguish judgments and decrees from *orders*. An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings. It is defined by the supreme court of California as "a decision made during the progress of the cause either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect."⁷ It will be observed that orders, under the codes, thus include the judgments formerly called interlocutory. An order is granted upon an application to the court called a motion.⁸ The term seems to be practically synonymous (except for its including interlocutory judgments) with *rule*. But the latter is more commonly

⁵State v. McArthur, 5 Kans. 280; Proc. N. Y. § 1200; Code Kans. § 895; Hughes v. Shreve, 8 Met. (Ky.) 547; Code Oregon, § 240.

Kramer v. Rebman, 9 Iowa, 114.

⁷Loring v. Illesley, 1 Cal. 27.

⁸Code Civ. Proc. Cal. § 577; Code Civ.

⁸Code Civ. Proc. Cal. § 1008; Code Civ. Proc. N. Y. § 767.

used in those states adhering to the common law practice, while order is generally employed in those which have adopted codes.*

§ 2. The Language of a Judgment.

"A judgment, though pronounced or awarded by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judge, but the settled and invariable principles of justice, and is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it; and therefore the style of the judgment is not that 'it is ordered or resolved by the court,' for then the judgment might be their own, but 'it is considered' — '*consideratum est per curiam*,' which implies that the judgment is none of their own, but the act of the law, pronounced and declared by the court upon determination and inquiry."¹⁰ At the same time there is no magic in this formula; nor is it a conclusive criterion whether a definitive judgment has been rendered that the entry employs or omits the usual phrase, *ideo consideratum est*. A judgment may be final and subject to review on writ of error, as well when entered without as with that clause.¹¹ The usual style of a decree is "it is ordered, adjudged, and decreed;" and of an order or rule, "it is ordered," etc.

§ 3. Essentials of a Judgment.

We are not at present concerned with the tests by which the *validity* of a judgment is to be determined, such as the question of jurisdiction, the status of the parties, the time, place, and manner of its rendition. But the object of this section is to indicate the essential

*The refusal of a court to issue the writ of *mandamus* is neither a judgment nor a decree. *Craddock v. Croghan*, 1 Sneed (Ky.) 100. Neither is a decision made by the court upon a matter addressed to its discretionary authority; as, an application to have a cause brought forward on the docket

and to vacate a certain judgment therein rendered. *Claggett v. Simes*, 25 N. H. 402.

¹⁰ *Baker v. State*, 3 Ark. 491, *Dickinson, J.*

¹¹ *Whitaker v. Bramson*, 2 Paine C. C. 209.

characteristics which must appear on the face of the decision in order to entitle it to be called a judgment for any purpose, even as a preliminary to investigating its validity. And first, it must appear to be the sentence of a court. As already stated, the award of arbitrators or of any self-constituted tribunal is not a judgment. The decision must purport to emanate from some court of justice known to and organized under the laws of the particular sovereignty. At the same time, it is usual to recognize the determinations of certain bodies invested with minor administrative powers, and acting in a judicial capacity in reference to their exercise,¹³ as equivalent to judgments of the courts. But it is only by analogy that these decisions can be called judgments. And in general, a paper purporting to be a judgment, but not stating by what court rendered, nor when, nor for what cause of action, is a nullity.¹⁴ Again, unless in the case of purely *ex parte* proceedings, it must appear to have been rendered between adverse parties, or, in a certain class of actions, between a party plaintiff and some *res* which stands in place of a defendant. The case of a proceeding against "unknown owners" is no real exception to this rule, for there is always a thing or right claimed, which may be personified as the plaintiff's adversary. And the judgment must of course appear to be in favor of one party and against the other. Again, the judgment must be definitive. It must purport to be the actual and absolute sentence of the law, as distinguished from a mere finding that one of the parties is *entitled* to a judgment, or from a direction to the effect that a judgment may be entered. "An order for a judgment is not the judgment, nor does the entry of such order partake of the nature and qualities of a judgment record."¹⁴ It

¹³Such as road commissioners, in adjudicating upon the necessity of a road, and in locating and making assessments for the same. *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525. Or a town council, in auditing and allowing a claim for a certain and ascertained amount. *Kelly v. Wimberly*, 61 Miss. 548.

¹⁴*Bevington v. Buck*, 18 Ind. 414.

¹⁴*Whitwell v. Emory*, 8 Mich. 84, 59 Am. Dec. 220. A written memorandum

by the judge, of certain conclusions of fact, with a formal order for more evidence on certain points, is not a judgment. *Putnam v. Crombie*, 84 Barb. 232. An entry: "I find for the plaintiff and assess his damages at," stating the amount, is not a final judgment, but simply a finding under the statute regulating the practice before referees. *Demens v. Poyntz* (Fla.) 6 South. Rep. 261.

has been held that an order of court allowing the plaintiff's attorney to enter up judgment for the plaintiff is in itself a sufficient judgment for the plaintiff for the amount sued for.¹⁵ But it may well be doubted whether this would hold good for all the purposes of a judgment. Where an interlocutory judgment is rendered by default, upon a claim for unliquidated damages, its amount may be left for ascertainment by proper proceedings. But we may say in general that if a judgment purports to be final, and is given upon a money demand, the amount of the recovery must be stated in it with certainty and precision. If the amount remains to be determined by a future contingency, or ascertained by referees, or diminished by the allowance of an unliquidated credit, or is otherwise indefinite and uncertain, it is no proper judgment.¹⁶ It remains to be stated that, in case of ambiguity, a judgment should be construed with reference to the pleadings, and when it admits of two constructions, that one will be adopted which is consonant with the judgment which should have been rendered on the facts and law of the case.¹⁷

§ 4. Consequences of a Judgment.

The first and most obvious consequence of a judgment is that it establishes an indisputable obligation and confers upon the successful party the right to issue execution or other process of the court for its enforcement. But this, it must be repeated, is it not an integral part of the judgment. The judgment is merely the affirmation of a liability. The right to use the process of the court for its enforcement is a consequence which the law attaches to it. A decree may direct a particular act to be done; a judgment *in rem* may specify the property out of which satisfaction is to be made; a judgment in replevin may require a return of the goods; in certain cases

¹⁵ Tift v. Keaton, 78 Ga. 235, 2 S. E. Rep. 690.

¹⁶ Battell v. Lowery, 46 Iowa, 49; McIlwaine v. Batchelor, 8 Dev. & B. 52; Early v. Moore, 4 Munf. 262; Mudd v. Rogers, 10 La. Ann. 648; Nichols v. Stewart, 21 Ill. 106. See *infra*, § 118.

¹⁷ Peniston v. Somers, 15 La. Ann. 679. In *detinue* for several slaves, a judgment in favor of the plaintiff for all of them except one, as to whom the judgment-entry is entirely silent, is a judgment in favor of the defendant for that one. Wittick v. Traun, 25 Ala. 317.

a judgment may be entered for a sum payable in a particular kind of money.¹⁹ But with these exceptions, the general principle holds good that the judgment, after performing its office of declaring the existence of a certain liability, leaves the party to pursue the remedies which the law provides.

Another important consequence of a judgment is that it creates a lien upon real estate owned by the debtor, which endures for a certain period, follows the land into the hands of purchasers or other lienors, and may be enforced by seizure and sale of the property subject to it. A separate chapter will be devoted to the consideration of this subject.

A further consequence of a judgment is that it creates an estoppel upon the litigants; so that a judgment rendered upon the merits will bar any further suit upon the same cause of action, between the same parties or their privies; and a point which was once actually and necessarily litigated and decided cannot again be drawn in question, by the same parties or their privies, in any future controversy upon the same or a different cause of action. These topics also will be discussed in later chapters of this work.

Another consequence flowing from the rendition of a judgment is that it may constitute either an evidence or a source of title. This may be illustrated by the result of a real action, by the case of a purchaser at execution-sale under a judgment, by a decree quieting title to lands or enforcing specific performance of a contract for their conveyance. Also in relation to chattels, it is held that satisfaction of a judgment recovered in an action of trespass for their conversion passes property in such chattels to the defendant, and that his title thus acquired takes effect by relation from the time of the conversion.²⁰

§ 5. Judgment is not an Assignment.

Thus far, in discussing the nature of judgments, we have spoken only of their essential characteristics. It now becomes necessary to distinguish them from certain other legal transactions to which they

¹⁹ See *infra*, § 152.

²⁰ *Smith v. Smith*, 51 N. H. 571.

bear a resemblance. And first, since the *result* of a judgment may be to deprive the debtor of his property and transfer it (or its proceeds) to the creditor, it has been thought that the judgment, especially where it was confessed, might be construed as an assignment. There is, however, no validity in this position. As has been said: "A judgment is not an assignment. One is the act of the party, the other the act of the law; in the one case the debtor surrenders the dominion to another, in the other he submits without opposition to the course prescribed by law."²⁰

§ 6. Judgment is not a Specialty.

A judgment of a domestic court of record is not a specialty, within the meaning of a statute which provides for the limitation of "actions upon the case, covenant, and debt, founded upon a specialty, or any agreement, contract, or promise in writing, within fifteen years."²¹

§ 7. Judgments sometimes called Contracts.

The notion that a judgment is to be considered as a contract appears to have originated with Blackstone.²² At any rate, the present writer has been unable to discover any authority for such a proposition in the earlier reports or text-books. But the statement of the learned commentator, to that effect, has been accepted without question or demur by many of the succeeding text-writers, and put for-

²⁰ Breeding v. Boggs, 20 Pa. St. 33, Lewis, J.

²¹ Tyler's Ex'rs v. Winslow, 15 Ohio St. 364.

²² 8 Bl. Comm. 160. In speaking of such contracts as are implied by law, he says: "Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular

sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge."

ward as a recognized principle of law in numerous American cases.²³ Thus in New York it is said: "A judgment is a contract of the highest nature known to the law. Actions upon judgment are actions on contract. The cause or consideration of the judgment is of no possible importance; it is merged in the judgment. When recovered, the judgment stands as a conclusive declaration, that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim and the defendant's assent thereto. This assent may have been reluctant, but in law it is an assent, and the defendant is estopped by the judgment to dissent. Forever thereafter any claim on the judgment is setting up a cause of action on contract."²⁴ So, in a Massachusetts decision, in holding that a judgment by default against a married woman, in the absence of an enabling statute, was void, the court said: "A judgment is in the nature of a contract; it is a specialty and creates a debt; and to have that effect, it must be taken against one capable of contracting a debt."²⁵ But in this country the question has chiefly arisen in the construction of statutory provisions requiring certain formalities, or prescribing limitations, in actions "founded on contract," and in the interpretation of that clause of the federal constitution which prohibits to the states any legislation impairing the obligation of contracts. In regard to the former class of cases, it has been held that a judgment is a contract within the meaning of a statute which provides that several causes of action may be united when they arise out of contract express or implied, and hence an action upon a judgment may be joined with an action for the breach of an express contract.²⁶

²³Sawyer v. Villas, 19 Vt. 48; Morse v. Toppan, 8 Gray, 411; McGuire v. Gallagher, 2 Sandf. 402; Humphrey v. Persons, 23 Barb. 818; Taylor v. Root, 4 Keyes (N. Y.) 344; Johnson v. Butler, 2 Iowa, 535; Farmers' Bank v. Mather, 30 Iowa, 283; Reed v. Eldredge, 27 Cal. 248; Stuart v. Landers, 16 Cal. 372; 76 Am. Dec. 538; Childs v. Harris Manuf'g Co., 68 Wis. 231, 32 N. W. Rep. 43;

Weaver v. Lapsley, 43 Ala. 224; 1 Para. on Contr. 7.

²⁴Taylor v. Root, 4 Keyes (N. Y.) 335, Woodruff, J.

²⁵Morse v. Toppan, 8 Gray, 411, Shaw, C. J.

²⁶Childs v. Harris Manuf'g Co., 68 Wis. 231, 32 N. W. Rep. 43. For other illustrations under this head, see Sawyer v. Villas, 19 Vt. 48; McGuire v. Gallagher, 2 Sandf. 402.

In regard to the latter class of cases, there are decisions to be found that judgments are covered by the prohibition against laws impairing the obligation of contracts.²⁷

§ 8. The Opposite View.

On the other hand, a carefully considered English case, subsequent in date to Blackstone, holds that a judgment is not in any sense a contract; and this view is supported by numerous and respectable American authorities.²⁸ Thus a learned judge has remarked: "The obligation of a debt on a judgment does not arise from any express contract made by the party charged by it. *Judicium redditur in invitum*. Upon a refined and artificial view of the obligations imposed by law upon every individual, they may be resolved into a contract which he makes with society to obey the laws by which he is protected. And the force of legal obligation has, by some elementary writers, been attempted to be strengthened upon this principle, (3 Bl. Comm. 160.) But contracts of this description are not barred by this part of the statute [of limitations]." ²⁹ So again: "A cause of action on contract or tort loses its identity when merged in a judgment, and thereafter a new cause of action arises out of the judgment whenever it becomes necessary to enforce the obligation by suit. The

²⁷ *Scarborough v. Dugan*, 10 Cal. 305; *Weaver v. Lapsley*, 48 Ala. 224. But in the latter case the question was upon the constitutionality of a certain statute entitled "an act to declare void certain judgments and to grant new trials in certain cases therein mentioned." And the original cause of action in this litigation (the judgment in which came under the act) was a contract. So that the true ground of the invalidity of the statute was, not that it impaired the obligation of the *judgment* obtained on such contract, but that, by vacating the judgment, it cancelled the remedy on the *original contract itself*, and so impaired its obligation. See Black, Const. Pro. § 197. And see *Sprott v. Reid*, 3 Iowa, 489, 56 Am. Dec. 549.

²⁸ *Bidleson v. Whytel*, 3 Burr. 1548; *Wadsworth v. Henderson*, 16 Fed. Rep. 447; *Todd v. Crumb*, 5 McLean, 172; *Jordan v. Robinson*, 15 Me. 168; *Wyman v. Mitchell*, 1 Cow. 316; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *McDonald v. Dickson*, 87 N. Car. 404; *Napier v. Gldiere*, 1 Speer Eq. 215, 40 Am. Dec. 618; *Keith v. Estill*, 9 Port. 669; *Smith v. Harrison*, 33 Ala. 706; *Masterson v. Gibson*, 56 Ala. 56; *Lovins v. Humphries*, 67 Ala. 437; *Wolffe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Williams v. Waldo*, 8 Scam. 269; *Rae v. Hulbert*, 17 Ill. 572; *Sprott v. Reid*, 3 Iowa, 489, 56 Am. Dec. 549; *Larrabee v. Baldwin*, 85 Cal. 156; *Freem. Judgm.* § 4.

²⁹ *Jordan v. Robinson*, 15 Me. 168.

liability of the debtor no longer rests upon his voluntary agreement, but upon the adjudication of the court into which the former has passed."²⁰ The last sentence is especially significant.

§ 9. Where the Cause of Action is in Tort.

Whatever may be said in regard to a judgment which is rendered upon the actual contract of the parties, it must be perfectly apparent that a judgment upon a cause of action sounding in *tort* cannot be considered as in any sense a contract. True, the judgment merges the cause of action. But that means that the plaintiff cannot afterwards sue upon the original claim or use it otherwise. It does not mean that it is metamorphosed into something diametrically opposite to what it was before. And it is held, upon the highest authority, that a judgment in an action for a tort is not a contract within the meaning of that provision of the federal constitution which forbids the states to pass any law impairing the obligation of contracts.²¹ "A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, a promise to pay is implied where such legal obligation exists. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the federal constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition."²²

²⁰ McDonald v. Dickson, 87 N. Car. 404.

²¹ Garrison v. City of New York, 21 Wall. 196; McAfee v. Covington, 71 Ga. 272, 51 Am. Rep. 268; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. Rep. 763.

²² Field, J., in Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct.

Rep. 211. See State v. New Orleans, 32 La. Ann. 709, holding that claims arising from a mob—as a city's statutory obligation to make good damages done by a mob,—are not protected by this clause of the federal constitution, though reduced to judgment.

§ 10. Judgments are not Contracts.

Upon the whole question, we are unable to concede that judgments can properly be considered contracts under any circumstances whatever. So far as concerns the authority of Blackstone, it is not difficult to perceive that in dividing contracts into three classes, beginning with "contracts by record," he was misled by that same love of a neat classification which more than once led him into error. The mistake lies in grouping under the same technical term things which properly belong there and things which belong there only by a remote analogy. Further, his whole argument upon this point rests upon the assumption of an original "social contract"—a theory long since exploded. Admit that society is a natural organism, not a compact, and we look in vain for the implied promises supposed to have been made by each person on entering into the social state.

Of the American decisions sharing this view (not very numerous or very well considered), some have been content to take the statement for granted, without probing the arguments advanced in its support. Others have followed the same specious reasoning which deceived the originator of the theory. And others, begging the question, have decided that a particular judgment could not be valid because it did not answer to the requirements of a contract, as in respect to the capacity of the person to make a contract or incur a debt.²³ But, as we have seen, there is a preponderance of authority in favor of the proposition that judgments are *not* contracts.

But in point of fact, the most distinctive mark of a contract is wanting, viz: the assent of both parties.²⁴ To this there are two apparent exceptions, the case of judgments by confession and judgments by default. But in the former instance, the agreement of the debtor is that the creditor may take a particular means of securing his claim. The judgment is not the agreement; it is the act of the

²³ As in *Morse v. Toppan*, 8 Gray, 411, a decision which is probably wrong, and which certainly furnishes an illustration of looking at a legal question upside down.

²⁴ "The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented." *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64.

law, invoked by the parties, in *executing* the agreement. In the latter case, the defendant merely submits to what would, presumably, be done with or without his assent. Nor will the theory of an implied assent fill the gap. If we admit the assumption which lies at the base of this doctrine, it is not difficult to transform any imaginable right of action into a contract. For instance, it is the duty of every good citizen to pay his taxes; yet no one thinks that the entry on the assessor's book is a contract which he has made. If the *duty* of every member of society to pay the debts which are charged against him as the result of legal proceedings can be construed into his *agreement* to pay them, it is illogical to stop at causes of action which are strictly and properly *ex contractu*. It is just as true that he impliedly undertakes to make reparation for any delict which he may commit, as it is that he impliedly promises to pay judgments against him. But it would be rash to conclude that a tort is a contract.³² Some of the cases speak of this implied assent as a "reluctant assent." But this is practically a contradiction in terms. The submission which is wrung from a party who has made his best defense and can no longer help himself is not the movement of will which goes to the making of a contract.

Another indispensable requisite to a contract is that the parties should be legally capable of forming a binding agreement. And yet the immense majority of the cases hold that judgments rendered against infants, lunatics, and other persons who are in law disabled from contracting, are valid and conclusively binding until vacated or reversed.³³ To push this argument one step further: "It is not true that a judgment rests either upon the will or the capacity to contract of the party against whom it is rendered. If a judgment is a contract, and can only be rendered against one who is then capable of

³² "A judgment is no more a contract than is a tort. In one sense it is true that every member of society impliedly agrees to pay all judgments which may be regularly rendered against him; and in the same sense does he impliedly agree to make amends for all torts which he may commit. No one will pretend that actions for torts are with-

in the spirit and intent of the statute [in regard to actions upon 'any contract or agreement'], and yet they certainly are as much so as are actions upon judgments." *Rae v. Hulbert*, 17 Ill. 572, Caton, J.

³³ *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64.

contracting by the laws of the forum, there could not be a judgment on a contract made in another state [nor on a judgment rendered in another state], unless by the law of the forum that contract would be valid. This would destroy the rule of comity and international law which makes the validity of a contract and the capacity of the contractor depend on the place where the contract is made or is to be performed, or the domicile of the contractor, as the case may be, and not upon the law of the forum."³⁷

§ 11. The Question considered as one of Statutory Construction.

As already stated, the chief importance of this question arises in connection with the construction of constitutional and statutory provisions. And we are now prepared to formulate the rules which reason and principle seem to point out.

In the first place, a judgment is not a contract within the meaning of the prohibition against laws impairing the obligation of contracts. The cases which hold that it is,³⁸ proceed upon a misapprehension of the constitutional principle. It is true that statutes have been declared invalid, as obnoxious to this inhibition, which vacated judgments, granted new trials, enacted shorter statutes of limitation, exempted the debtor's property, gave stay of execution, and so on. But it was not because they attacked the judgment, but because they destroyed or desiccated the remedy on the *original contract*, which, on the authorities, is vital to the maintenance of its obligation.³⁹ If the cause of action was in tort, the constitutional clause does not apply.⁴⁰ But it is impossible to hold that view if every judgment is a contract.

In the next place, if a statute—for example, in prescribing limitations of actions—manifestly intends, on its face, to divide all

³⁷ *Wadsworth v. Henderson*, 16 Fed. Rep. 451. Barr, J.

³⁸ See *Weaver v. Lapsley*, 48 Ala. 224; *Scarborough v. Dugan*, 10 Cal. 805. But see *Sprott v. Reid*, 8 Iowa, 489, 56 Am. Dec. 549.

³⁹ Black on Const. Pro. §§ 152, 157, 163, 197, 199.

⁴⁰ *Garrison v. City of New York*, 21 Wall. 196; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. Rep. 211; *Freeland v. Williams*, 181 U. S. 405, 9 Sup. Ct. Rep. 763.

causes of action into two classes, actions on "contract" and actions on "tort," then a judgment must be considered as falling within the former class. Strictly it belongs to neither. But if the words are used in this extended sense, then "contract" must include "quasi-contract." And a judgment may reasonably be called a quasi-contract; for although it lacks some or all of the elements of a true contract, it is more nearly assimilated thereto than it is to a delict.⁴ It is the conclusive evidence of a fixed and ascertained debt, and that is sufficient to distinguish it from a claim in tort.

Finally, if the statute relates only to "contracts express or implied," or intends to divide possible causes of action into a larger number of classes than those mentioned above, a judgment cannot be considered as coming under the denomination of a "contract." In such a case, it must stand in a class by itself, and if not specifically mentioned, it is not within the purview of the act.

PART II. THE CLASSIFICATION OF JUDGMENTS.

§ 12. Methods of Classifying Judgments.

Several methods of classifying judgments have been proposed, none of which, perhaps, is strictly scientific or perfectly accurate. The difficulty is that so many complications arise in pleading and practice that an entirely regular classification cannot well be made without extending the number of groups beyond convenient limits. However, as the chief thing is to obtain an orderly arrangement and enumeration of the different varieties of judgments, the scientific nature of the method pursued is not of prime importance. Abandoning the division commonly acquiesced in, as being too unwieldy, we propose to arrange judgments under the four following heads:

1. Judgments on an issue of law.
2. Judgments upon a verdict.
3. Judgments without a verdict.
4. Judgments against a verdict.

⁴Moore v. Nowell, 94 N. Car. 365; Johnson v. Butler, 2 Iowa, 545.

§ 13. Judgments on an Issue of Law.

These judgments are given upon the decision of a demurrer. They are either for the plaintiff or defendant, as the case may be, and are of the following sorts:

1. For the plaintiff, when the issue raised by a demurrer to any of the pleadings is decided in his favor. This judgment is final and definitive and concludes the right of action. Its style is *quod recuperet*, that is, "that the plaintiff do recover."⁴³

2. For the plaintiff, when the issue raised by his demurrer to a dilatory plea or plea in abatement is found in his favor. This is called judgment of *respondeat ouster*, that is, that the defendant "do answer over" or further. It is not final, since the plea did not go to the merits, but requires the defendant, beaten on a preliminary point, to present a more substantial defense.⁴⁴

3. For the defendant, when the issue raised by a demurrer is determined in his favor. This is a final judgment, and disposes of the case, unless leave be granted to amend the pleading or withdraw the demurrer, as the case may be.⁴⁵

4. For the defendant, when the plaintiff's demurrer to a plea in abatement is overruled, and the plea consequently sustained. The language of this judgment is *quod cassetur breve*, or *billam*, that is, that the writ or declaration be quashed.

§ 14. Judgments upon Verdict.

We come next to such judgments as are rendered after the determination of an issue of fact by the verdict of a jury. They may be

⁴³ *Hale v. Lawrence*, 23 N. J. Law, 73; *Silver v. Rhodes*, 2 Harringt. 369; *Pettys v. Marsh*, (Fla.) 8 South. Rep. 577. But where defendant demurred for a variance between declaration and writ, and pending the demurrer leave was granted to amend, whereupon the demurrer was overruled, *held*, that the judgment should be *respondeat ouster*, and not *quod recuperet*. *Walker v. Walker*, 6 How. (Miss.) 500.

⁴⁴ *Trow v. Messer*, 32 N. H. 361; *Massey v. Walker*, 8 Ala. 167; *Heyfron v. Bank*, 7 Sm. & Mar. 484; *Randolph v. Singleton*, 20 Miss. 439; *Cooke v. Crawford*, 1 Tex. 9, 46 Am. Dec. 93.

⁴⁵ *Hale v. Lawrence*, 23 N. J. Law, 73; *Scharff v. Lisso*, 63 Miss. 313; *Ross v. Sims*, 27 Miss. 359; *Memphis & Charleston R. Co. v. Orr*, 53 Miss. 541; *Comstock v. Davis*, 51 Mo. 569.

either for the plaintiff or defendant, and are in all cases final and conclusive, if entered according to the verdict.

1. For the plaintiff, the judgment is *quod recuperet*.⁴⁵

2. For the defendant, if upon the merits, the judgment is *nil capiat per breve* or *per billam*, that is, that the plaintiff "take nothing" by his writ or declaration. If the plea was in abatement, the judgment is *cassetur breve*, as above.

§ 15. Judgments without Verdict.

This class of judgments includes numerous varieties. Those which may be rendered for the plaintiff are as follows:

1. Judgment by *default*. This is a judgment entered in consequence of the non-appearance of the defendant. Where the defendant omits to plead within the time required, the judgment taken against him for that cause is more properly called *nil dicit*, but the term "default" is usually extended to cover this case also. And in the code states, the judgment entered upon the defendant's failure to serve or file an answer within the prescribed period is called a judgment by default.

2. Judgment by *nil dicit*, which is rendered against a defendant for his failure to plead to the declaration.

3. Judgment by *non sum informatus*. This is a judgment which is rendered when, instead of pleading, the defendant's attorney declares that he "is not informed" of any answer or defense to be made.

4. Judgment by *confession*. This is a judgment which is entered for the plaintiff in case the defendant, instead of entering a plea, confesses the action, or at any time before trial confesses the action and withdraws his plea and other allegations.⁴⁶ This is called, in full, a judgment by confession *relicta verificatione*. A more usual form of judgment by confession is that which is entered where the debtor, without suit brought, gives a written instrument confessing that he is indebted to the creditor in a certain sum, and authorizing

⁴⁵ See *Texas, S. F. & N. R. Co. v. Saxton* (New Mex.) 6 Pac. Rep. 206.

⁴⁶ Bouvier, Law Dict. *see Judgment*.

an attorney to appear for him and enter judgment against him in a court of record.

5. Judgment on *motion*; a judgment authorized by statute in certain kinds of summary proceedings, rendered *ex parte* and without trial. This remedy, being in derogation of the common law, must be strictly pursued, and the judgment must show on its face all facts necessary to give jurisdiction.⁴⁷

6. Judgment on the *pleadings*. This is a form of judgment not infrequently used in the practice of the code states. It is rendered, on motion of the plaintiff, when the answer admits or leaves undenied all the material facts stated in the complaint.⁴⁸ It cannot be entered, in a suit for unliquidated damages, over an answer stating matters in mitigation.⁴⁹

Of this class of judgments, those which may be rendered for the defendant are as follows:—

1. Judgment of *nonsuit*. This judgment, given against the plaintiff, is either voluntary or involuntary. It is the former, when the plaintiff throws up his case and consents to a judgment for defendant for costs. It is the latter, when the plaintiff, on being called or demanded, at the instance of the defendant, to be present while the jury give their verdict, fails to appear. Also, where the court decides that the plaintiff has given no evidence on which the jury could find a verdict in his favor, an involuntary nonsuit is entered against him.

2. Judgment of *nolle prosequi*. This is a judgment entered against the plaintiff where, after appearance and before judgment, he declares that "he will not further prosecute his suit." It is used as a means of abandoning one or more counts in a declaration or parts of a cause of action, or releasing one or more of the joint defendants, while holding to the rest.

⁴⁷ *Garner v. Carrol*, 7 Yerg. 365; *Jones v. Read*, 1 Humph. 335.

⁴⁸ *Botto v. Vandament*, 67 Cal. 332, 7 Pac. Rep. 753; *Amador Co. v. Butterfield*, 51 Cal. 526; *Shattuc v. McArthur*, 25 Fed. Rep. 183; *Felch v. Beaudry*, 40 Cal. 439. But where facts showing the illegality of a contract sued on are suf-

ficiently alleged in the answer, the plaintiff cannot recover upon the pleadings, although such facts are not pleaded or insisted on as a defense. *Prost v. More*, 40 Cal. 847.

⁴⁹ *Shattuc v. McArthur*, 25 Fed. Rep. 183.

3. Judgment of *non prosequitur*, or *non pros*. A judgment given against the plaintiff for his default or neglect to take any of those steps in the proceedings which he is required to take in due time; as, a failure to file a declaration or other pleading.

4. Judgment of *retrahit*. This is a judgment given against the plaintiff when, after appearance, he voluntarily goes into court and enters upon the record a statement that "he withdraws his suit." It is an open and voluntary renunciation of his claim in court; wherein it differs from a nonsuit, which is merely his neglect or default; and by a *retrahit* the plaintiff's cause of action is forever barred.⁸⁰

In this class of judgments there is one which may be entered for either party, viz: judgment *by consent*. It is well known in practice. The attorneys of the respective parties to a suit, it is said, have undoubtedly the right to agree upon terms and what kind of judgment shall be entered; but the judgment must be one authorized by law.⁸¹

§ 16. Judgment against the Verdict.

Where the plea to the declaration confesses a cause of action in the plaintiff and sets up matter in avoidance, and such matter, though found true by the verdict of the jury, is insufficient in law to constitute a bar or defense to the action, the court will enter a judgment for the plaintiff *non obstante veredicto*, that is, notwithstanding the verdict.⁸² For, "the plea being substantially bad in law, of course the verdict which merely shows it to be true in point of fact cannot avail to entitle the defendant to judgment; while, on the other hand, the plea, being in confession and avoidance, involves a confession of

⁸⁰ *Thomason v. Odum*, 81 Ala. 106, 68 Am. Dec. 159; 8 Bl. Comm. 296.

⁸¹ *Tupperry v. Hertung*, 46 Mo. 185. See *Jones v. Webb*, 8 S. Car. 202; *Summar v. Owen*, 59 Tenn. 26.

⁸² *Pim v. Grazebrook*, 2 C. B. 429; *Atkinson v. Davies*, 11 Mees. & W. 286; *Berwick v. Duncan*, 8 Exch. 644; *Roberts v. Dame*, 11 N. H. 226; *Fitch v. Scott*, 1 Root, 351; *Bellows v. Shannon*, 2 Hill, 86; *Moye v. Petway*, 76 N. Car.

327; *Ward v. Phillips*, 89 N. Car. 215; *State v. Commercial Bank*, 6 Sm. & Mar. 218, 45 Am. Dec. 230; *Garrett v. Beaumont*, 24 Miss. 377; *Sullenberger v. Gest*, 14 Ohio, 204; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 782; *Berry v. Borden*, 7 Blackf. 384; *Pomeroy v. Burnett*, 8 Blackf. 142; *Jones v. Fennimore*, 1 Iowa, 184; *Oades v. Oades*, 6 Nebr. 304; 2 Tidd's Prac. 920.

the plaintiff's declaration, and shows that he was entitled to maintain his action."⁵³ For example, a plea of tender of rent after the day of its falling due is insufficient, and after a verdict on such plea in favor of the defendant, the plaintiff is entitled to judgment *non obstante veredicto*.⁵⁴ But in order that this judgment may be given, it is essential that the plea should distinctly imply an admission of the plaintiff's right or title.⁵⁵

There are other cases beside the foregoing in which a judgment *non obstante veredicto* may be rendered, or an analogous species of judgment. Thus, in some of the states, in cases where the special findings of the jury are in direct conflict with the general verdict, it is the practice to grant a judgment notwithstanding the verdict.⁵⁶ But unless the special findings "are so irreconcilably in conflict with the general verdict as that both cannot stand, the motion must be overruled without regard to the evidence."⁵⁷ And the motion for this judgment can be made only by the party *against* whom the verdict goes; hence, if the general verdict is in his favor, but the special findings do not correspond with it, a motion in that behalf will not avail him.⁵⁸

Another instance in which this form of judgment may be rendered, is where the decision on a "point reserved" negatives the verdict of the jury. If a point of law is ruled provisionally at the trial, but subject to the further consideration of the court, and if its ultimate decision shows that the party in whose favor the verdict goes is not entitled to judgment, the court may enter judgment notwithstanding the verdict. But the record must show the point of law reserved and the specific facts on which it arises.⁵⁹

At common law, a *defendant* is not entitled in any circumstances

⁵³ Bouvier, Law Dict. *voc. Judgment*.

⁵⁴ Dewey v. Humphrey, 5 Pick. 187.

⁵⁵ Pim v. Grazebrook, 2 C. B. 429.

⁵⁶ Felton v. Chicago, R. I. & P. R. Co., 69 Iowa, 577, 29 N. W. Rep. 618.

⁵⁷ Porter v. Waltz, 108 Ind. 40, 8 N. E. Rep. 705, citing Cox v. Ratcliffe, 105 Ind. 874, 5 N. E. Rep. 5; Pennsylvania Co. v. Smith, 98 Ind. 42; Baltimore, etc.,

Co. v. Rowan, 104 Ind. 88, 8 N. E. Rep. 637.

⁵⁸ Brown v. Searle, 104 Ind. 218, 8 N. E. Rep. 871.

⁵⁹ Wilde v. Trainor, 59 Pa. St. 443; Fayette City Borough v. Huggins, 112 Pa. St. 1, 4 Atl. Rep. 927; Buckley v. Duff, 111 Pa. St. 223, 3 Atl. Rep. 823; Keifer v. Eldred Township, 110 Pa. St. 1.

to move for judgment *non obstante veredicto*; if the verdict is for the plaintiff, and the state of the pleadings is such that the latter might have asked for this judgment had their positions been reversed, the only proper course for the defendant is to move that the judgment be arrested.⁶⁰ It appears, however, that this rule has been relaxed in a few of the states, so as to admit of the entry of this judgment in favor of the defendant in a proper case.⁶¹

A motion for judgment *non obstante veredicto* is founded on the record alone, and not on affidavits or extrinsic evidence.⁶² And such motion, in the absence of an agreement by the parties that it may be filed and considered in vacation, cannot be considered by the court when so filed.⁶³

There is one other form of judgment, entered in disregard of a verdict, which must be mentioned in this connection. It is the judgment *quod partes replacent* (that the parties replead), or judgment of repleader. This is entered in a case where issue has been taken upon a point so immaterial that, notwithstanding the verdict, the court is unable to decide which party should recover upon the merits. It requires the parties to frame their pleadings anew, from the fault which first occasioned the immaterial issue, taking issue upon a substantial ground. A repleader differs from a judgment *non obstante veredicto* in this, that the latter is granted in a case where the plea is good in form though the matter pleaded is not available as a defense, while the former is only proper where the pleadings do not bring the merits within the issue. Hence the latter kind of judgment is always upon the merits, and never granted but in a very clear case; a repleader is upon the form and manner of pleading.⁶⁴

⁶⁰ *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. Rep. 462; *Smith v. Powers*, 15 N. H. 546; *Smith v. Smith*, 4 Wend. 468; *Schermerhorn v. Schermerhorn*, 5 Wend. 513; *Bellows v. Shannon*, 2 Hill, 86; *Bowdre v. Hampton*, 6 Rich. 208; *Buckingham v. McCracken*, 2 Ohio St. 287; *Bradshaw v. Hedge*, 10 Iowa, 402; *Lough v. Thornton*, 17 Minn. 253, (Gil. 230.)

⁶¹ *Martindale v. Price*, 14 Ind. 115; *Carl v. Granger Coal Co.*, 69 Iowa, 519, 29 N. W. Rep. 487.

⁶² *Snow v. Conant*, 8 Vt. 309; *Smith v. Smith*, 2 Wend. 624.

⁶³ *Scribner v. Rutherford*, 65 Iowa, 551, 23 N. W. Rep. 670.

⁶⁴ 2 *Tidd's Prac.* 923.

§ 17. Names of Judgments in certain Special Actions.

Before completing our enumeration of the different kinds of judgments, it is necessary to mention the special names given to the judgments in certain actions. In the action for partition, the interlocutory judgment whereby it is directed that partition be made, is called judgment *quod partitio fiat*; while the style of the final judgment in the same action, confirming the partition made, upon the return of the writ, is *quod partitio facta firma et stabilis in perpetuum*.⁴⁵ The interlocutory judgment in an action of account, whereby it is directed that "the defendant do account," is called judgment *quod computet*.

§ 18. Cross-Classifications of Judgments.

There are certain methods of classifying judgments and decrees, without regard to the mode of trial, stage of entry, or rendition of a verdict, and hence running across the division above adopted, which are important to be named. And first, they are either final or interlocutory. A final judgment or decree is one which puts an end to the whole action, leaving nothing further to be done or determined by the court. It is interlocutory, if it merely settles some preliminary or subordinate point, without reaching the merits, or if, though directed to the main controversy, it does not dispose of the whole case, but leaves something for the further action or consideration of the court before the rights of the parties are definitely fixed. This distinction will form the subject of the next chapter.

Judgments and decrees are also either domestic or foreign. A judgment is called domestic when it was rendered by a court organized by the same state or sovereignty within whose territory it is sought to be enforced or is invoked as a defense. It is called foreign when rendered by another or independent state or sovereignty.

In Louisiana, a judgment rendered by default is distinguished from a "contradictory judgment;" the latter being one which is given after the parties have been heard either in support of their claims or in their defense.

⁴⁵ 5 Bac. Abr. 292, cited Freem. Judgm. § 8.

Judgments and orders may further be classed as absolute or *nisi*. At common law a judgment *nisi* was one entered on the return of the *nisi prius* record with the *postea* indorsed, which would become absolute according to the terms of the *postea*, unless the court out of which the *nisi prius* record proceeded should, within the first four days, otherwise order.⁶⁶ It is otherwise defined as "one that is to be valid unless something else should be done within a given time to defeat it."⁶⁷ A rule or order *nisi* is one which is to be confirmed or made absolute, unless cause be shown to the contrary, or something be done which has been required, within a specified time.

Adjudications are also classed as either *in rem* or *in personam*. This distinction is one of difficulty and importance, and the former kind of judgments will form the subject of a later chapter, to which the reader is referred for the definitions.

§ 19. Classification of Decrees.

In addition to the divisions indicated in the preceding section, decrees in equity are classed as "by default," "by consent," "on the hearing," and "*pro confesso*." The last named—a decree that the bill be taken as confessed—is entered where the defendant, by not appearing within the time prescribed, is understood to admit the case made by the bill. It is intended to prepare the case for final decree; and its effect is like that of a default at common law, by which the defendant is deemed to have admitted all that is well pleaded in the declaration.⁶⁸ A decree *nisi* is one entered upon the defendant's failure to appear when the case is called for hearing, granting the relief asked, but coupled with a condition that the defendant is to have a certain time within which to show cause against the decree.

⁶⁶ Bouvier, Law Dict. *sub voce*.

⁶⁷ United States v. Winstead, 12 Fed.

Rep. 50. See Strickland v. Cox, (N. Car.) 9 S. E. Rep. 414.

⁶⁸ Russell v. Lathrop, 122 Mass. 802.

CHAPTER II.

FINAL AND INTERLOCUTORY JUDGMENTS AND DECREES.

- § 20. Reasons for the Distinction.
- 21. Definition of Final Judgments.
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- 44. Decree ordering a Reference.
- 45. Directing an Account.
- 46. Decree suspending Rights until further Orders.
- 47. Decree dissolving Partnership.
- 48. Foreclosure of Mortgage.
- 49. Sending Issue out of Chancery.

§ 20. Reasons for the Distinction.

The distinction between final judgments and decrees and such as are merely interlocutory, is one of considerable importance, both as a matter of practice and in respect to the consequences which follow the entry of a final adjudication. As a general rule, it is only a final judgment which has the effect of creating a lien upon the debtor's

reality. So also, with certain minor exceptions, it is only a final judgment or decree upon the merits which will sustain the plea of *res judicata*. At common law, a writ of error could not be brought until the last, or final, decision in the cause. In many of the states, it is provided by statute that appeals may be taken to their courts of last resort only from the final judgments of the trial courts or the final decrees of the courts of chancery. By the federal judiciary act¹ it is enacted that error may be brought to the final judgments at law or decrees in equity of the highest courts in the several states for the purpose of their re-examination by the supreme court of the United States in certain prescribed cases. Thus, for these various reasons, it is often necessary to distinguish final decisions from the interlocutory class of adjudications. The cases in which such a distinction is drawn are numerous, illustrating the wide range of instances in which the question may arise, and not always harmonious; for the practice, or the statute-law, in some jurisdictions, ascribes the character of finality to judgments or orders which elsewhere are considered as merely interlocutory.

§ 21. Definition of Final Judgments.

A final judgment is such a judgment as at once put an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues.² It is sometimes said that it is the award of the judicial consequences which the law attaches to the facts, and which determines the subject-matter of the controversy between the parties.³ It is evident, however, that this description is too narrow. For a final judgment means not a final determination of the rights of the parties with reference to the subject-matter of the litigation, but merely of their rights with reference to the particular suit.⁴ In other words, it is not at all necessary that the judgment should be upon the merits, if it definitely puts

¹ U. S. Stats. at L. 79, § 25.

² 8 Bl. Comm. 898.

³ West v. Bagly, 12 Tex. 34, 63 Am. Dec. 512, following Hanks v. Thomp-

son, 5 Tex. 6. And see Hobbs v. Staples, 19 Me. 219.

⁴ Belt v. Davis, 1 Cal. 184; Weston v. Charleston, 2 Pet. 449; Klink v. Cusseta, 80 Ga. 504.

the case out of court. A judgment of nonsuit or dismissal is final, though it does not reach the merits. It is the termination of the individual action which marks the finality of the judgment. But there must be an actual judgment. An order for judgment is not a final judgment; it is final only when it contains the decision or sentence of the law upon the matter contained in the record; the order must be followed by the sentence of the law declaring that the party may recover the sum adjudged.⁵ On the other hand, a judgment is as final when pronounced by the court as when entered and recorded by the clerk.⁶ Where a motion for new trial has been made and entertained by the court, the judgment in the case does not become final and effectual, for purposes of review, until the date of the overruling of such motion.⁷

A judgment which is not final is called interlocutory. That is, an interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of court. Thus a judgment or order passed upon any provisional or accessory claim or contention is, in general, merely interlocutory, though it may finally dispose of that particular matter.⁸

Under the common law system, an *order*, made in the progress of a suit and before judgment, will be considered final if it determines the action and prevents a judgment.⁹ But an order which does not settle and conclude the rights involved in the action, and does not deny to the party the means of further prosecuting or defending the suit, is not so far final as to be a proper subject of appeal.¹⁰

⁵ *Macnevin v. Macnevin*, 63 Cal. 186; *Eastham v. Sallis*, 60 Tex. 576.

⁶ *Kehoe v. Blethen*, 10 Nev. 445.

⁷ *Brown v. Evans*, 18 Fed. Rep. 56; *New York, C. & St. L. R. Co. v. Doane*, 105 Ind. 92, 4 N. E. Rep. 419. So where judgment rendered against a party not personally served is liable, by statute, to be vacated within three years, it does not become final until after that time. *Martin v. Gilmore*, 72 Ill. 193.

⁸ But it has been held that a decree allowing temporary alimony and counsel fees is, to all legal intents and purposes, a final judgment, from which an appeal may be taken. *Daniels v. Daniels*, 9 Colo. 183, 10 Pac. Rep. 637.

⁹ *Hobbs v. Beckwith*, 6 Ohio St. 253; *Maysville & Lexington R. Co. v. Punnett*, 15 B. Monr. 47.

¹⁰ *Hazlehurst v. Morris*, 28 Md. 67.

§ 22. Under the Codes.

The codes of procedure adopted in several of the states define a judgment as "the *final* determination of the rights of the parties in an action or proceeding." Under this system, therefore, there is no such thing as an interlocutory judgment in a cause, the only judgment authorized being one which finally disposes of the rights of the parties.¹¹ And the office of an interlocutory judgment at common law is, under the code practice, filled by various orders. But as, among the various orders which may be made in the progress of a cause, there may be some which, without finally adjudicating "the rights" of the parties, may determine some claim or contention which, from its independence and meritorious nature, ought to be the subject of an appeal, therefore in these states the statutes usually allow appeals from "an order affecting a substantial right" of one of the parties.¹² The qualifying adjective is used to exclude rulings on merely formal or technical points. The code practice is, generally speaking, more liberal in allowing appeals than the common law. Thus in California, "an appeal may be taken from an order granting or refusing a new trial, from an order granting or dissolving an injunction, from an order refusing to grant or dissolve an injunction, from an order dissolving or refusing to dissolve an attachment, from an order granting or refusing to grant a change of the place of trial."¹³

§ 23. Must be final as to all Parties.

As a general rule, a judgment must possess the character of finality in disposing of the rights of *all* the parties concerned, before it can be considered final with respect to *any* of them. Thus when suit is instituted against two or more defendants, and judgment is entered

¹¹ *Sellers v. Union Lumber Co.*, 36 Wis. 398.

¹² For illustrations of orders affecting substantial rights, see *Gilbert v. Thayer*, 104 N. Y. 200, 10 N. E. Rep. 148; *State Bank of Nebraska v. Green*, 9

Nebr. 165, 1 N. W. Rep. 270; *Starbuck v. Dunklee*, 10 Minn. 168, 88 Am. Dec. 68; *Kingsley v. Gilman*, 12 Minn. 515, (Gil. 425); *Vermilye v. Vermilye*, 32 Minn. 499, 18 N. W. Rep. 832.

¹³ Code of Civil Proc. Cal. § 989.

for or against all of them except one, who is not mentioned or referred to in the decision, there is no final judgment from which an appeal can be taken, no order appearing for the disposal of the cause as to the defendant omitted from the judgment.¹⁴ It has been held that a decree against one of several defendants (whose interests are not connected), with a direction for the payment of costs as to such defendant, is final as to him, although the cause may still be pending as to the others.¹⁵ But the weight of authority is to the effect that an adjudication of the right or liability of one party does not become final, even as to him, while the cause remains undisposed of as to others.¹⁶

§ 24. Must settle all the Issues.

It is also requisite that a judgment, in order to be final, should determine all the issues involved in the cause. The decision on an issue of law which does not put the case out of court is not of this character. So if there are several issues of fact in the same controversy, the decision of one of them, leaving the others undetermined, is not a final adjudication. For there cannot be two final judgments in the same action. Thus, in an action of ejectment, where the defendant, besides legal defenses, set up also an equitable defense and asked affirmative relief, viz: that the court should declare that the deed under which the plaintiff claimed was in effect a mortgage, and this equitable branch of the case was taken up, tried, and disposed of before coming to the legal defenses, and an order was made and entered up in the form of a decree, declaring that the instrument in question was not a mortgage but a valid deed conveying title to the plaintiff, it was held that this was not a final judgment from which the defendant could appeal.¹⁷

¹⁴ Whitaker v. Gee, 61 Tex. 217; Masterson v. Williams (Tex.) 11 S. W. Rep. 581; Schultz v. McLean (Cal.) 18 Pac. Rep. 775.

¹⁵ Royall v. Johnson, 1 Rand. 421, And see Nichol v. Dunn, 25 Ark. 129.

¹⁶ Peck v. Vandenberg, 30 Cal. 11; Martin v. Crow, 28 Tex. 614; Delap v. Hunter, 1 Sneed, 101; Whitaker v. Gee, 61 Tex. 217.

¹⁷ Low v. Crown Point Mining Co., 2 Nevad. 75.

§ 25. Uncertainty of the Amount.

An uncertainty as to the amount of the recovery will often prevent a judgment from becoming final until such amount is liquidated and declared. The test in these cases seems to be, whether the judicial action of the court is necessary to be directed to the question before the amount of the judgment can be settled, or whether, though at present uncertain, it can be determined or computed without the intervention of the court. Thus a judgment by default is interlocutory if the damages remain to be ascertained by writ of inquiry or other judicial proceeding. So a decree which settles the rights of the parties, but does not find the amount to be paid, leaving that for future determination, is not final.¹⁸ The same is true of a decree which, after finding the equities to be in one of the parties, sends the case to a referee or master to ascertain and report the sum which he is entitled to recover.¹⁹ For the report must be examined and confirmed by the court, before there is a final judgment for such sum. On the other hand, where a judgment is entered against one of the parties, to be released on payment of such sum as a third person shall say is due, it is a final judgment; because, to make it absolute so far as regards the amount, no further action of the court is necessary, but only the certificate of the referee.²⁰ So a decree in chancery which adjudges a certain sum of money to be due from the defendant, and awards execution to collect it, is a final decree, notwithstanding it also allows as payment to be deducted from the amount therein adjudged any note held by the defendant against the complainant.²¹ Also, a decree is final, although an order is added to it suspending the decree as to one item of the account, until the decision of another suit, in which that item is in litigation.²²

¹⁸ *Hunter v. Hunter*, 100 Ill. 519.¹⁹ *Belmont v. Ponvert*, 8 Rob. (N. Y.) 698; *Price v. Nesbit*, 1 Hill Ch. 445; *Tuggle v. Gilbert*, 1 Duvall, 840; *Deickhart v. Rutgers*, 45 Mo. 183. But see *Ayer v. Termatt*, 8 Minn. 96, (Gil. 71.)²⁰ *Turner v. Plowden*, 5 Gill. & J. 52, 28 Am. Dec. 596; *Young v. Mackall*, 3 Md. Ch. Dec. 898.²¹ *Stovall v. Banks*, 10 Wall. 583.²² *Fleming v. Bolling*, 8 Gratt. 292.

§ 26. Judgment of Nonsuit.

This species of judgment is clearly final, since it completely disposes of the action, though without passing upon the merits. "By a final judgment is to be understood not a final determination of the rights of the parties, but merely of the particular suit. Thus, for instance, a judgment of nonsuit, other than where the plaintiff submits to a voluntary nonsuit, is a final judgment, even though no costs be awarded against the plaintiff, inasmuch as he is aggrieved by being defeated of his right of action in that suit and of his costs in prosecuting it."²³

§ 27. Dismissal of Suit.

The dismissal of a bill in chancery or of a suit at law, since it fully disposes of that action, is a final judgment; it is a final decision of the case as against all claims made by it, although it may not be a final determination of the rights of the parties, as they may be presented in some other action.²⁴ Thus a judgment dismissing a suit for want of prosecution, in which a temporary injunction had been granted, amounts to a determination by the court that the injunction was improperly granted, and is in effect a final judgment in favor of the defendant.²⁵ So a judgment discharging a garnishee is a final and complete disposition of the cause, and the court has thereafter no jurisdiction over it; so that a judgment against the

²³ *Belt v. Davis*, 1 Cal. 184. A judgment of nonsuit may be reviewed on error. *Box v. Bennett*, H. Bl. 483. That a judgment of *non pros.* is a final judgment, see *Hartford Fire Ins. Co. v. Green*, 52 Miss. 882.

²⁴ *Dowling v. Polack*, 18 Cal. 625; *Zoller v. McDonald*, 28 Cal. 186; *Leese v. Sherwood*, 21 Cal. 151; *Stoppenbach v. Zohrlaut*, 21 Wis. 385; *Bowie v. Kansas City*, 51 Mo. 454; *Gill v. Jones*, 57 Miss. 387; *Scriven v. Hursh*, 39 Mich. 98; *Snell v. Dwight*, 121 Mass. 848; *Bowler v. Palmer*, 2 Gray, 558; *Eddleman v. McGlathery* (Tex.) 11 S. W. Rep. 1100; *Rodgers v. Russell*, 11 Nebr. 361, 9 N.

W. Rep. 547. An order "that this board will proceed no further in the premises, and that the respondents be hence discharged and go thereof without day," is a final adjudication that the petitioner has sustained no damage. *Smith v. Mayor of Boston*, 1 Gray, 72. Where one of several defendants pleads to the action and the plaintiff replies, and on motion of a co-defendant the original writ of summons is quashed, and judgment "that he go hence," that is no final judgment in favor of the defendant pleading. *State Bank v. Roddy*, 15 Ark. 401.

²⁵ *Dowling v. Polack*, 18 Cal. 625.

garnishee for costs, at a subsequent term, is void.²⁶ This rule, however, is subject to certain exceptions. Thus it is said that while, in an ordinary case, a judgment dismissing a suit is final, yet an action of replevin is an extraordinary remedy, and in such action a judgment dismissing the suit is not final, and error cannot be assigned upon such an order until after final judgment.²⁷ Again, an order in equity dismissing a cross-bill is interlocutory merely, and such an order is not subject to review in the appellate court until the whole case is disposed of.²⁸

§ 28. Judgment by Default.

The rule in regard to a judgment by default is, that if such a judgment is rendered for a fixed and liquidated sum, or if the amount can be ascertained by mere calculation from the pleadings, it is final; but if the amount of the recovery or damages remains to be ascertained by a writ of inquiry or other judicial method of computation, then the judgment is merely interlocutory, until such amount is settled and entered on the record.²⁹ "A judgment by default is interlocutory or final. When the action sounds in damages, as covenant, trover, trespass, etc., it is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. But where the amount of the judgment is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount, the judgment is final."³⁰ Where suit is brought against two defendants who

²⁶ *Jackson v. St. Louis & San Francisco R. Co.*, 89 Mo. 104, 1 S. W. Rep. 224.

²⁷ *Branch v. Branch*, 5 Fla. 447.

²⁸ *Fleece v. Russell*, 18 Ill. 81. A decree sustaining a motion to strike out a reconventional demand presented by the defendant in his answer to a suit which has not yet gone to trial, is not final but interlocutory. *State v. Judge*, 35 La. Ann. 765.

²⁹ *Sellers v. Burk*, 47 Pa. St. 344; *McClung v. Murphy*, 2 Miles (Pa.) 177; *Beitler v. Zeigler*, 1 Pen. & W. 135; *Martin v. Price*, Minor (Ala.) 68; *Maury v. Roberts*, 27 Miss. 225; *Hyde v. Pink-*

ard, 25 Ark. 163. See *Dorsey v. Thompson*, 37 Md. 25. A judgment obtained for the want of a plea, in a *qui tam* action of debt, is interlocutory and not final. *Daniel v. Cooper*, 2 Houst. (Del.) 506. Judgment for want of appearance in an action on the case, without declaration filed or anything to indicate the amount, is interlocutory in the first instance, and becomes final when the amount is settled and entered on the record. *Phillips v. Hellings*, 5 Watts & S. 44.

³⁰ *Clements v. Berry*, 11 How. 398, *McLean*, J.

are jointly and severally liable, and one suffers a default, and the other puts in a plea and goes to trial, the judgment entered against the former defendant, on his default, is merely interlocutory until the case is disposed of as to the other.²¹

"An order that a bill be taken *pro confesso* is interlocutory and intended to prepare the case for a final decree. Its effect is similar to that of a default in an action at common law, by which the defendant is deemed to have admitted all that is well pleaded in the declaration. The defendant has lost his standing in court, and is not entitled to notice of its further proceedings, but the matters set forth in the bill do not pass in *rem judicatam* until the final decree."²²

§ 29. Judgment on Demurrer.

When the issue of law raised by a demurrer is decided in favor of the plaintiff, and judgment is entered *quod recuperet*, such judgment is of course final if the amount of the recovery is fixed. Similarly,

where such an issue is found for the defendant, and judgment for his discharge is given, it is final; for the decision has the effect of disposing of that particular suit. The case is otherwise where the plaintiff's demurrer to a dilatory plea is sustained. For here the judgment is *respondeat ouster*, which, as its name implies, does not terminate the action, but only requires the defendant to plead to the merits. And all the authorities agree that a decision or order of the court sustaining or overruling a demurrer, but not entering judgment thereon so as to dispose of the case, is merely interlocutory.²³ It is

²¹ Commonwealth v. McCleary, 92 Pa. St. 188.

²² Russell v. Lathrop, 123 Mass. 300, Devens, J.

²³ Warner v. Tomlinson, 1 Root, 201; Paddock v. Ins. Co., 12 N. Y. 591; Elwell v. Johnson, 74 N. Y. 80; Johnson v. Polk Co. (Fla.) 8 South. Rep. 414; Rose v. Gibson, 71 Ala. 85; Shields v. Taylor, 18 Sm. & Mar. 127; State v. Falconer (Ark.) 58. W. Rep. 193; Slagle v. Bodmer, 58 Ind. 465; Hays v. Caldwell, 5 Gilm. 33; Knapp v. Marshall, 26 Ill. 63; Gage v. Eich, 56 Ill. 297; Palmer

v. Crane, 8 Mo. 619; Robinson v. County Court, 32 Mo. 428; State v. Justices, 58 Mo. 588; Kirchner v. Wood, 48 Mich. 199, 12 N. W. Rep. 44; Maraga v. Emeric, 4 Cal. 308; Miller v. Railroad, 7 Nebr. 227. A decision sustaining or overruling a demurrer is an order, not an interlocutory judgment, and as it is not enumerated in the specification of appealable orders (Code Civ. Proc. N. Y. § 1849), an appeal does not lie to the general term from such a decision. Cambridge Valley Nat. Bank v. Lynch, 76 N. Y. 514.

also to be noted that the general rule is subject to certain exceptions depending on the peculiar nature of the action or the local rules of practice. Thus, a final judgment, in an action to recover a penalty imposed by statute, to be recovered "on conviction," cannot be entered on demurrer, but only on a trial upon the merits.²⁴ So, in Mississippi, it is said that, under the statute, judgments on demurrers are not final until the end of the term, until which time, on proper showing, they may be set aside.²⁵

§ 30. Judgment on Plea in Abatement.

Where issue is joined upon a matter of a plea in abatement and found against the defendant, the judgment for the plaintiff is final.²⁶ It is different in regard to the decision of a preliminary question of jurisdiction. Thus, in a litigation respecting the distribution of a testator's property, a question arose as to his domicile, and after hearing testimony the court decided that "his domicile was in the city of W.," and "this court has original jurisdiction in the matter of his estate." It was held that this was not a final judgment.²⁷

§ 31. Judgment for Costs.

A judgment which merely awards costs to the defendant, without more, is not a final judgment.²⁸ In order to have that character, it must profess to terminate and completely dispose of the action. Hence, if for the defendant, the final judgment must state that he is dismissed without day, or that it is considered that the plaintiff take nothing by his suit, or otherwise refer to the disposition made of the subject-matter. "The form of the judgment," say the court in Texas, "is immaterial, but in substance it must show intrinsically and dis-

²⁴ *Reagh v. Spann*, 3 Stew. 100.

²⁵ *Shields v. Taylor*, 18 Sm. & Mar. 127.

²⁶ *Jewett v. Davis*, 6 N. H. 518; *McCartee v. Chambers*, 6 Wend. 649, 23 Am. Dec. 556; *Haught v. Holley*, 8 Wend. 258.

²⁷ *Benjamin v. Dubois*, 118 U. S. 46, 6 Sup. Ct. Rep. 925.

²⁸ *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782; *Green v. Banks*, 24 Tex. 523; *Whitney Iron Works Co. v. Reuss (La.)* 3 South. Rep. 500; *Dusing v. Nelson*, 7 Colo. 184, 2 Pac. Rep. 922; *Higbee v.*

tinctly, and not inferentially, that the matters in the record had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated. The costs are regulated by statute, and are an incident or appendage of the judgment, and generally are recoverable by the victor in the contest. But, as an incident, they cannot be substituted for the principal; and a judgment for their recovery is not a decision of the matter at issue; and it is therefore no such final judgment as can, by law, come within the revisory power of this court."³⁹

§ 32. Granting or Refusing Extraordinary Remedies.

According to the general consensus of judicial opinion, an order or decree granting a provisional or temporary injunction, with a reference to ascertain facts, or directing a trial at law, or otherwise reserving the merits; or a decree refusing to grant, or dissolving, a temporary injunction which is merely an incident of the relief sought, is interlocutory only, not final.⁴⁰ But a decree in favor of the complainant for a *perpetual* injunction, with costs, is final; for that completely adjudicates the relief asked and speaks the last word in the case.⁴¹ And so, generally, is a decree dissolving an injunction, or refusing to dissolve it, where that is the sole or the main object of the bill.⁴² It must be noted, however, that these rules may not apply in

Bowers, 9 Mo. 354. See *Sprott v. Reid*, 8 Iowa, 489, 56 Am. Dec. 549.

³⁹ *Scott v. Burton*, 6 Tex. 323, 55 Am. Dec. 782. Hemphill, C. J.

⁴⁰ *Gibbons v. Ogden*, 6 Wheat. 448; *Barnard v. Gibson*, 7 How. 650; *Verden v. Coleman*, 18 How. 86; *Norton v. Hood*, 12 Fed. Rep. 768; *Humiston v. Stainthorp*, 2 Wall. 106; *Price v. Strange*, 2 Hen. & M. 615; *Green v. Banks*, 24 Tex. 522; *Ex parte Hawley*, 24 Ark. 596; *Moss v. Ashbrooks*, 15 Ark. 169; *Pentecost v. Magahee*, 4 Scam. 326; *Lucan v. Cadwallader* (Ill.) 7 N. E. Rep. 286; *Jefferson v. Bohemian Ass'n*, 5 Ill. App. 280; *Harrison v. Rush*, 15 Mo. 175; *Tanner v. Irwin*, 1 Mo. 65; *Wing v. Warner*, 2

Dougl. (Mich.) 268; *Choteau v. Rice*, 1 Minn. 24, (Gil. 8); *School Distr. v. Brown*, 10 Nebr. 440; *Smith v. Sahler*, 1 Nebr. 310; *Scofield v. State Nat. Bank*, 8 Nebr. 16.

⁴¹ *French v. Shoemaker*, 12 Wall. 86; *Merchants' Bank v. Kent*, 43 Mich. 292, 5 N. W. Rep. 627; *Rickards v. Coon*, 13 Nebr. 419, 14 N. W. Rep. 162. But see *Brown v. Swann*, 9 Pet. 1.

⁴² *Salay v. Collins*, 30 La. Ann. 68; *Titus v. Mabree*, 25 Ill. 257; *Prout v. Lamer*, 79 Ill. 331; *Hedges v. Meyers*, 5 Ill. App. 847; *Oberkoetter v. Luellbering*, 4 Mo. App. 481; *McVickar v. Wolcott*, 4 Johns. 510. But see *Hiriart v. Ballon*, 9 Pet. 156.

some of the states where the code practice obtains. In those jurisdictions, orders granting or dissolving an injunction, or overruling a motion to that effect, are frequently found in the enumerated classes of appealable orders;⁴⁵ or they may be considered as orders "affecting a substantial right" and hence subject to the revisory power of the upper courts.

On analogous principles, it must be held that an order of the court granting or refusing the writ of *mandamus* in the alternative, is not a final judgment. But its action in allowing or denying a peremptory *mandamus*, or in making the interlocutory writ absolute, is final to all legal intents and purposes. And so where the parties to a proceeding for this writ dispense, by agreement, with a return or answer and other formal pleadings authorized by statute, and submit the case upon the petition and an agreed statement of facts in lieu of such pleading, and the case is heard as an application for a peremptory *mandamus*, and a judgment is rendered thereon dismissing the petition, this is a final judgment reviewable on error.⁴⁶

A judgment or decree appointing a *receiver*, to take charge of the property in litigation, or to administer the revenues of the defendant, subject to the direction of the court, during the pendency of the suit, is not considered a final judgment.⁴⁷ And an order removing a receiver is likewise interlocutory.⁴⁸ In two states, nevertheless, it is held that orders appointing receivers are final and appealable.⁴⁹ This is a variance of local practice. But in the system of procedure under the codes, where proceedings of this character are classed as "special proceedings," and an order made in such proceedings which affects

⁴⁵ Code of Civ. Proc. Cal. § 939.

⁴⁶ State v. Ottinger, 43 Ohio St. 457, 3 N. E. Rep. 298.

⁴⁷ Fuller v. Adams, 12 Ind. 559; Produce Bank v. Morton, 40 N. Y. Superior Ct. 828; Eaton & Hamilton R. Co. v. Varnum, 10 Ohio St. 622; Hottenstein v. Conrad, 5 Kans. 249; Maysville & Lexington R. Co. v. Punnett, 15 B. Monr. 47; Kansas Rolling Mill Co. v. Atchison, T. & S. F. R. Co., 81 Kans. 90, 1 Pac. Rep. 274; Lewis v. McCabe, 16

Mo. App. 896; Stebbins v. Savage, 5 Mont. 258, 5 Pac. Rep. 278.

⁴⁸ Farson v. Gorham, 117 Ill. 187, 7 N. E. Rep. 104.

⁴⁹ Lewis v. Campau, 14 Mich. 458, 90 Am. Dec. 245; Taylor v. Sweet, 40 Mich. 736; *In re Graeff*, 80 Minn. 858, 16 N. W. Rep. 395. A decree appointing a trustee to sue under a deed of trust is final as to that matter, and binding alike on parties to the decree and strangers. Griffin v. Doe, 12 Ala. 783.

a substantial right is final and appealable, it seems reasonable that a decision granting or refusing a receiver should be considered as final for this purpose, since it does not turn upon a formal or technical point, but goes to the claim of the party to secure the property in litigation in the most efficacious manner.⁴⁸

§ 33. On Motion for New Trial.

It is generally held that a judgment or order granting a new trial in an action at law is not a final judgment, and an appeal cannot be taken until the judgment is rendered which terminates the suit.⁴⁹ So also, an order overruling a motion to set aside the verdict of a jury and refusing to grant a new trial, is interlocutory only, and an appeal or writ of error must be addressed to the judgment entered on the verdict.⁵⁰ The same remark is true of an order denying an application for a rehearing.⁵¹ And in a case where the report of a referee appointed by the special term to take proofs and determine as to rival claims to surplus money in foreclosure had been confirmed at special term, and that adjudication was reversed at general term, the latter court ordering a new hearing before another referee to be appointed by the special term, it was held that such order of the general term was not a final order, and therefore not appealable to the court of appeals.⁵² In Iowa, however, it is held that an appeal may be maintained from an order refusing a new trial, although no judgment has been entered on the verdict.⁵³ And in California, and perhaps some other states, it is provided by statute that "an appeal

⁴⁸ *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1.

⁴⁹ *Houston v. Starr*, 12 Tex. 424; *Stewart v. Jones*, 9 Tex. 469; *House v. Wright*, 23 Ind. 333; *White v. Harvey*, 23 Ind. 55; *Byers v. Butterfield*, 33 Mo. 376; *McDonough v. Nicholson*, 46 Mo. 35; *Lawson v. Moore*, 44 Ala. 274.

⁵⁰ *Kearney v. Snodgrass*, 12 Oreg. 311, 7 Pac. Rep. 309; *Whittaker v. West Boylston*, 97 Mass. 273; *Holdsworth v. Tucker* (Mass.) 18 N. E. Rep. 430; *Dameron v. Ferguson* (W. Va.) 9 S. E. Rep.

39; *Conord v. Runnels*, 23 Ohio St. 601.

⁵¹ "Former decisions sustaining such appeals have long since been overruled." *Roberts v. State*, 3 Tex. App. 47, citing *Mayfield v. State*, 40 Tex. 239; *Anschinck v. State*, 43 Tex. 537; *Young v. State*, 1 Tex. App. 64.

⁵² *Mayor of New York v. Schermerhorn*, 1 N. Y. 423.

⁵³ *Mutual Life Ins. Co. v. Anthony*, 105 N. Y. 57, 11 N. E. Rep. 281.

⁵⁴ *Baldwin v. Foss*, 71 Iowa, 339, 33 N. W. Rep. 339.

may be taken from an order granting or refusing a new trial."⁶⁴ But where an order refusing a new trial and dismissing the motion therefor is itself appealable, no appeal will lie from an order refusing to revoke a prior order to that effect.⁶⁵

§ 34. Vacating or Reversing former Judgment.

Where, under the code system of procedure, an independent action is brought for the purpose of vacating a former judgment between the same parties and procuring a new trial of the action, and the relief is granted as asked, it seems that the judgment to that effect must be considered as final and appealable. For the issues in the independent suit having been determined and the relief accorded, the decision puts an end to that controversy.⁶⁶ But where the application comes in the form of a motion made in the same cause, and the court grants an order opening or vacating the judgment already entered, it is clear that such an order is no final judgment; on the contrary, it merely suspends the finality of the original judgment until the case has been heard and decided anew.⁶⁷ Nor is the case otherwise where the court denies the application. A refusal to open a judgment is not a judgment, sentence, or decree; it concludes nothing, and is not assignable for error.⁶⁸ "It is settled that when a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside."⁶⁹ A writ of error cannot be taken from the supreme court

⁶⁴ Code of Civ. Proc. Cal. § 939.

⁶⁵ *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. Rep. 396.

⁶⁶ *McCall v. Hitchcock*, 7 Bush, 615; *Belt v. Davis*, 1 Cal. 134. A probate court rescinded an order formerly made by it appointing a certain person guardian of a minor; *held*, that the rescinding order was a final judgment and appealable. *State v. Allen*, 92 Mo. 20, 4 S. W. Rep. 414.

⁶⁷ *McCulloch v. Dodge*, 8 Kans. 476; *Higgins v. Brown*, 5 Colo. 345; *Brown v. Edgerton*, 14 Nebr. 453, 16 N. W.

Rep. 474. An order of a court of equity suspending a sale and operating as a continuation and renewal of the former order of sale, is not a final decree. *Dorsey v. Thompson*, 37 Md. 25.

⁶⁸ *Evans' Adm'r v. Clover*, 1 Grant (Pa.) 164.

⁶⁹ *Goyhinech v. Goyhinech*, (Cal.) 23 Pac. Rep. 175, citing *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. Rep. 396; *Tripp v. Railroad Co.*, 69 Cal. 632, 11 Pac. Rep. 219; *Reay v. Butler*, 69 Cal. 585, 586, 11 Pac. Rep. 463; *Railroad Co. v. Railroad Co.*, 65 Cal. 295, 4 Pac. Rep. 18; *Holmes*

of the United States to the appellate court of a state on a judgment of the latter court which merely reverses that of the trial court and awards a *venire facias de novo*, such judgment not being final.⁶⁰ But a judgment of a superior court remanding a case to an inferior court for entry of judgment, and leaving no judicial discretion to the latter as to further proceedings, is final.⁶¹

§ 35. Order of Interpleader.

An order of court requiring parties to interplead is in general merely interlocutory, since it settles no rights, and merely serves to prepare the case for examination and decision.⁶² So an order directing the payment into the registry of the court of a garnishee fund, claimed by a third person, pending the determination of the right to it, is not a final judgment or decree.⁶³

§ 36. Dissolving Attachments and Executions.

It is held, by the almost universal agreement of the authorities, that judgments, orders, or decrees, quashing or dissolving attachments, or refusing to do so, are merely interlocutory.⁶⁴ For an attachment is, in general, only an incident of the suit, and a decision upon its validity or applicability is no more than the settlement of a preliminary and subordinate question, leaving untouched the ultimate rights of the parties and not disposing of the main controversy. Still, in

v. McCleary, 68 Cal. 497; Coombs v. Hibberd, 48 Cal. 452; Water Co. v. Parker, 16 Cal. 88; Stearns v. Marvin, 8 Cal. 376.

⁶⁰ Houston v. Moore, 8 Wheat. 433. "A judgment of a lower appellate court, which reverses the judgment of the court of original jurisdiction and remands the case to it for further proceedings, is not a final judgment. A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case." Field, J., in Smith v. Adams, 130 U. S. 167, 9 Sup. Ct. Rep. 566.

⁶¹ Mower v. Fletcher, 114 U. S. 127, 5 Sup. Ct. Rep. 799.

⁶² Barth v. Rosenfeld, 36 Md. 604.

⁶³ Louisiana Bank v. Whitney, 121 U. S. 284, 7 Sup. Ct. Rep. 897.

⁶⁴ Jacobi v. Schloss, 7 Cold. 385; Cutler v. Gumberts, 8 Ark. 449; Butcher v. Taylor, 18 Kans. 558; Abbott v. Zeigler, 9 Ind. 511; Woodruff v. Rose, 43 Ala. 882; Bray v. Laird, 44 Ala. 295; Wearson v. Smith, 80 Ky. 216; Baldwin v. Wright, 8 Gill, 241; Talbot v. Pierce, 14 B. Monr. 196; Hanson v. Bowyer, 4 Met. (Ky.) 108; Wickham v. Nalty, (La.) 6 South. Rep. 128.

one state at least, a contrary view is maintained, and it is thought that a judgment dismissing an attachment is in its nature final, and error will lie on it, notwithstanding the cause may still be pending below on the declaration to have a recovery on the merits, as if the suit had been brought by ordinary process.⁶⁵ There is something to be said for this position. For, as the court observed, the whole attachment element is disposed of by the order for its dismissal. Any judgment which may be thereafter recovered will have no aid from the levy of the attachment. Its lien will rank only from the date of the judgment, and the security of the replevy bond will be lost. "To maintain his attachment, it was the right of the plaintiff to have the judgment dismissing it reviewed by a separate writ of error."⁶⁶ Similarly it has been held that a decision of the court upon a rule or motion to quash an execution is merely interlocutory, not a final judgment.⁶⁷ But this view also has been denied.⁶⁸

§ 37. Order removing Cause.

An order for the removal of a cause from a state court to the circuit court of the United States, for trial, under the various acts of Congress in that behalf, is without question a final order.⁶⁹ "An order removing or refusing to remove a cause, civil or criminal, to another court for trial, finally adjudicates a constitutional right of the party affected by the order. And it is regarded as a judgment, from which, according to the nature of the case, an appeal or writ of error may be immediately prosecuted."⁷⁰ Conversely, the decision of the federal court upon a motion to *remand* the cause to the state court from which it came, on the ground of its irregular or improper removal, or for want of jurisdiction, is in its nature final and appealable. It must be remarked, however, that since the act of Congress of March 3, 1887, on this subject, it is only when the circuit court

⁶⁵ *Bruce v. Conyers*, 54 Ga. 678.

⁶⁶ *Bruce v. Conyers*, 54 Ga. 678. See Code of Civ. Proc. Cal. § 989.

⁶⁷ *McCargo v. Chapman*, 20 How. 555.

⁶⁸ *Loomis v. Lane*, 29 Pa. St. 242, 72 Am. Dec. 625.

⁶⁹ *Home Life Ins. Co. v. Dunn*, 20 Ohio St. 175, 5 Am. Rep. 642.

⁷⁰ *McMillan v. State*, 68 Md. 307, 12 Atl. Rep. 8.

denies a motion to remand that an appeal can be taken to the United States supreme court; if it decides that the removal was wrongfully or improperly ordered, and remands the cause, an appeal or writ of error is expressly forbidden.⁷¹

§ 38. Settling Accounts of Executors and Trustees.

It is held that the allowance by a probate court of an annual account of an executor or administrator is not a final judgment from which an appeal can be taken.⁷² But of course the case is otherwise when settlement is made of the final accounts of personal representatives, or of a guardian, committee, or conservator. So the accounts of a trustee, when filed in the proper court and confirmed, are definitive decrees of that court, and are not open to re-examination.⁷³

§ 39. Judgment in Partition.

According to the usual practice in proceedings for partition of land, a preliminary judgment or decree is rendered, directing that partition be made, *quod partitio fiat*, and nominating certain persons to effect a division and report to the court. When the report is confirmed, or the method of apportionment otherwise fixed, and all the rights of the parties adjusted and settled, another judgment is entered declaring that the partition shall stand as approved. Now the first decree in these proceedings, establishing the existence of a co-tenancy, ordering that partition be made, and appointing commissioners, is generally interlocutory.⁷⁴ But the first decree in partition *may* be

⁷¹ Dillon, Removal of Causes (5th Edn.) § 161. A certificate of division of opinion of the judges in the federal circuit court, accompanied by a statement of facts, to serve as a basis for an appeal to the supreme court of the United States, is not a final judgment which will support the plea of *res judicata*. *Anderson v. Valentine*, 15 La. Ann. 379.

⁷² *Baker v. Runkle*, 41 Mo. 392.

⁷³ *Moore's Appeal*, 10 Pa. St. 435.

⁷⁴ *Green v. Fisk*, 108 U. S. 518; *Beebe v. Griffing*, 6 N. Y. 465; *Gesell's Appeal*,

84 Pa. St. 288; *Templeman v. Steptoe*, 1 Munf. 339; *Young v. Skipwith*, 2 Wash. (Va.) 800; *Putnam v. Lewis*, 1 Fla. 455; *Medford v. Harrell*, 8 Hawks, 41; *Clester v. Gibson*, 15 Ind. 10; *Davis v. Davis*, 36 Ind. 160; *Kern v. Maginniss*, 41 Ind. 398; *Pipkin v. Allen*, 29 Mo. 239; *Durham v. Durham*, 84 Mo. 447; *Ivory v. Delore*, 26 Mo. 505; *Gates v. Salmon*, 28 Cal. 320; *Peck v. Vandenberg*, 30 Cal. 11; *Mills v. Miller*, 2 Nebr. 299. Under the present statute, where land is ordered to be sold for purposes of parti-

final, and it will have that character, if it settles all the rights of the parties and leaves nothing for the future consideration or judicial action of the court.⁷⁶ Thus a decree declaring that the plaintiff is entitled to one undivided third of the land in question, and appointing commissioners to make partition, is held to be a final decree and appealable before the subsequent proceedings are had.⁷⁶ And so, where a judgment was passed for the partition of realty among the heirs who were entitled to it, and commissioners were appointed to make the division without further orders of the court, it was considered to be a final determination of the rights of the parties and therefore appealable.⁷⁷ But an unauthorized declaration, in the order for partition, that the plaintiff's share of the rents and profits received by defendant as tenant in possession shall constitute a special lien, and that a special execution shall issue therefor, cannot have the effect to convert an otherwise interlocutory order into a final and appealable judgment.⁷⁸

§ 40. In Condemnation Proceedings.

A judgment rendered in proceedings for the condemnation of land under the power of eminent domain, where adversary proceedings have been had between the petitioner and the parties whose interests are to be affected, and the court has confirmed a report of commissioners appointed to assess the value of the land taken, and it is adjudged that the petitioner has complied with the statutory requirements, is a final judgment.⁷⁹ On similar principles, a decree of confirmation of a report of viewers laying out a road is final until reversed on *certiorari*.⁸⁰

tion, there is no final judgment till the sheriff's report of sale is filed and an order is entered approving the same and directing distribution of the proceeds. The order of partition and sale is not a final judgment. *Murray v. Yates*, 73 Mo. 13.

⁷⁶ *Ansley v. Robinson*, 16 Ala. 793; *Banton v. Campbell*, 2 Dana, 421; *Damouth v. Klock*, 28 Mich. 163.

⁷⁶ *Williams v. Wells*, 62 Iowa, 740, 16 N. W. Rep. 518. See *Cannon v. Hemphill*, 7 Tex. 184.

⁷⁷ *Beatty v. Beatty's Adm'r.* (Ky.) 5 S. W. Rep. 771.

⁷⁸ *Holloway v. Holloway* (Mo.) 11 S. W. Rep. 233.

⁷⁹ *Railroad Co. v. Harlan*, 24 Cal. 337.

⁸⁰ *Hunter's Private Road*, 46 Pa. St. 250.

§ 41. Finality of Decrees.

In drawing the distinction between final and interlocutory adjudications, the greatest difficulty has been experienced in the case of decrees in equity, the confusion arising principally from the peculiar nature of these decisions and the wide range of means which chancery possesses both for informing the mind of the judge and for acting upon the parties concerned. Many tests of finality have been proposed, some proceeding upon opposite principles, some viewing the same principle in different aspects. Thus, several cases hold that a decree is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.⁴¹ This is perhaps a little too broad. For, as we shall see, it does not impair the finality of a decree that it has to pass through the hands of a master, for ministerial acts to be done in relation to it, before it is ready for execution. Other cases define a final decree as that which is made when all the material facts in the cause have been ascertained, so as to enable the court to understand and decide on the merits of the case.⁴² According to another authority, any decree is final which renders the equities incapable of change in the further progress of the cause.⁴³ Or where nothing remains to be done which may be the subject of exception or appeal.⁴⁴ Or where the decree "completely and finally disposes of some branch or part of the cause which is separate and distinct from the other parts of the case."⁴⁵ Another case, coming much nearer to a satisfactory definition, holds that the final decree is not necessarily the last decree rendered, by which all proceedings in the case are terminated, and nothing is left open for the future judgment or action of the court; but it is a decree which determines the substantial merits of the controversy,—all the equities of the case,—though

⁴¹ *Railroad Co. v. Southern Ex. Co.*, 106 U. S. 24, 2 Sup. Ct. Rep. 6; *Grant v. Ins. Co.*, 106 U. S. 429, 1 Sup. Ct. Rep. 414; *Cook's Heirs v. Bay*, 4 How. (Miss.) 485; *Vanmeter v. Vanmeter*, 3 Gratt. 148.

⁴² *Jaques v. Methodist Episcopal Church*, 17 Johns. 548, 8 Am. Dec. 447.

⁴³ *Jones v. Wilson*, 54 Ala. 50.

⁴⁴ *Bellamy v. Bellamy*, 4 Fla. 242.

⁴⁵ *Evans v. Dunn*, 26 Ohio St. 439.

there may remain a reference to be had, or the adjustment of some incidental or dependent matter.⁸⁵

The difficulty appears to arise in relation to those decrees which, while settling the general equities of the cause, leave something for future action or determination. And the true rule seems to be, that if that which remains to be done or decided will require the action or consideration of the court before the *rights involved* in the cause can be fully and finally disposed of, the decree is interlocutory; but it is none the less final if, after settling the equities, it leaves a necessity for some further action or direction of the court in *execution* of the decree as it stands. This rule is well brought out in a decision of the supreme court of Ohio, from which, for its clearness and accuracy, we proceed to quote at some length. "A decree is final," says Reed, J., "which disposes of the whole merits of the cause, and leaves nothing for further consideration of the court. A decree is interlocutory which finds the general equities, and the cause is retained for reference, feigned issue, or consideration, to ascertain some matter of fact or law when again it comes under the consideration of the court for final disposition. When no further action of the court is required, it is final; when the cause is retained for further action, it is interlocutory. Further decrees and orders of the court sometimes become necessary to carry into effect the rights of parties fixed by final decree; and final decrees oftentimes direct an act to be done, as in case of specific performance, that on payment of the purchase-money as specified in the final decree the vendor shall execute a deed; or, in case of redemption, that on payment of the money due, the mortgage be cancelled; or even sometimes all the rights of the parties being found, and all the consequences to flow from a certain fact having been determined, a reference as to such fact may be had to a master, and still the decree be final. The confusion has sprung up from failing to observe the distinction between facts and things to be ascertained *preparatory* to final decree, and facts and things to be ascertained *in execution* of final decree. Because a final decree might

⁸⁵ Walker v. Crawford, 70 Ala. 567. of a decree until confirmed. Champlin
See Travis v. Waters, 1 Johns. Ch. 85. v. Railroad, 9 Heisk. 683.
A report in chancery has not the effect

direct that certain facts should be ascertained in execution of such decree, it will not make it interlocutory; nor, on the other hand, because a decree finds the general equities of the cause, and reference is had to a master to ascertain facts preparatory to a final disposition, will it be regarded as final. It seldom happens that a first decree can be final to conclude the cause, and yet, in all cases, the general equity should be found, and the principles laid down for the government of the master, before reference had. But such decrees are never held to be final."⁸⁷

§ 42. Further Action necessary to settle the Equities.

Adopting the rule set forth in the preceding section, it will now be desirable to give some illustrations of cases in which the decree has been held interlocutory merely, because some further act or decision was necessary before the equities could be completely settled and disposed of. And first, when the further action of the court in the cause is necessary to give completely the relief contemplated by the court, the decree upon which the question arises is not to be regarded as final.⁸⁸ Thus, a judgment of foreclosure, directing the sale of the mortgaged premises, and the payment by the defendant of any deficiency which may arise on such sale, is not such a final judgment as that an action will lie upon it, because, on such a judgment, further proceedings, such as the confirmation of the referee's report, etc., must be had before a personal judgment can be entered.⁸⁹ So a judgment dissolving a partnership, ascertaining the sum of money due by the copartners to the plaintiff, ordering a sale of the copartnership property and effects, and decreeing payment therefrom of the amount due plaintiff, but providing that in case the amount realized from such sale is not sufficient to pay the judgment, that the plaintiff shall be entitled to a personal judgment against the individual members of the firm for the deficiency, is not a final judgment, but merely an interlocutory decree.⁹⁰ So also, a reservation of the ques-

⁸⁷ *Kelley v. Stanbery*, 18 Ohio, 408, 421.

⁸⁸ *Miller v. Cook*, 77 Va. 806; *Cocke v. Gilpin*, 1 Rob. (Va.) 20.

⁸⁹ *Hanover Fire Ins. Co. v. Tomlinson*, 8 Hun, 630.

⁹⁰ *White v. Conway*, 66 Cal. 838, 5 Pac. Rep. 672.

tion of *costs*, in a decree which in other respects disposes of the subject-matter of the suit, renders such decree interlocutory.⁸¹ Again, a decree ordering an act to be done before the decree itself can be effectual is interlocutory.⁸² And a decree which decides definitely in favor of the complainant in respect to one of the claims presented, but reserves the consideration of another claim, constituting an integral part of the case, is not final.⁸³ So if it directs an act to be done, but requires a report to be made of the manner of its performance; as where the decree authorizes an executor to sell the real estate of his testator for the payment of debts, and to report his proceedings in execution thereof to the court.⁸⁴ But it has been held, by a high authority, that when a decree passes for a certain sum of money, and the complainant is entitled to have it immediately carried into execution, it must be regarded as final to that extent, and appealable, although so much of the bill is retained in the court below as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.⁸⁵

§ 43. Further Action necessary to execute the Decree.

The second branch of the rule above stated is, that although further acts or directions may be necessary to carry the decree into effect, it is still final if it settles the equities. Thus, a decree that defendants should assign a certificate of lands to the plaintiff, provided he should, before a given day and after a tender of the assignment, pay a certain sum of money to them, is a final decree.⁸⁶ So where certain of the stockholders in a corporation filed their bill in equity, praying that the proceedings of a meeting of stockholders, and of the directors in accordance therewith, might be set aside as void for fraud, and for the appointment of a receiver, and the court granted the relief prayed in the bill, but added a clause to the decree reserving such

⁸¹ *Dickenson v. Codwise*, 11 Paige, 189. But compare *McFarland v. Hall*, 17 Tex. 691.

⁸² *Hays v. Mays*, 1 J. J. Marsh. 497.

⁸³ *Bond v. Marx*, 58 Ala. 177.

⁸⁴ *Goodwin v. Miller*, 2 Munf. 42.

And see *Donaldson v. Bank*, 4 S. Car. 106.

⁸⁵ *Forgay v. Conrad*, 6 How. 201.

⁸⁶ *Turner v. Crebill*, 1 Hamm. 868. And see *Harmon v. Bynum*, 40 Tex. 824.

further directions, as to costs, etc., as might be necessary to carry the decree into execution, it was held that this was a final decree.⁹⁷ Again, a decree which ascertains the sum in the hands of a party to be accounted for, and those who are entitled to it, and orders it to be paid over to the parties entitled, and directs the costs of the suit to be paid first out of the fund, and makes no reference to a master, and seeks to ascertain no new fact, but assumes that the court is in full possession of all the facts, so as to adjudicate between the contestants according to equity and conscience, is a final decree, although it also requires the accountant to report to the court his distribution and dealing with the fund.⁹⁸ It must be remembered that it is not essential, for a judgment to be final, that it should settle all the rights existing between the parties to the suit; all that is required is that it should determine the issues involved in the action.⁹⁹

§ 44. Decree ordering a Reference.

The most difficult cases in which to draw the line between final and interlocutory decrees, are those in which the decree, after finding the general equities, orders a reference to a master for some specific purpose. Yet there are not wanting principles upon which to base a reasonable and accurate distinction in these cases. As the condensed result of the numerous authorities on the subject, we may formulate the following specific rules. First, where a decree is made disposing of the general equities of the case, but ordering a reference to a master to ascertain damages, or to find certain facts, or to do anything else necessary to be done before a final adjustment of the rights of the parties can be had, if the functions of the master are to be *judicial*, and not merely ministerial, and the provisions depending on his report are not already incorporated in the decree, then the decree is interlocutory and not final.¹⁰⁰ Second, where a decree ascer-

⁹⁷ Winthrop Iron Co. v. Meeker, 109 U. S. 180, 8 Sup. Ct. Rep. 111.

⁹⁸ Ledyard v. Henderson, 46 Miss. 260.

⁹⁹ Perkins v. Sierra Nevada, etc., Co., 10 Nevad. 405.

¹⁰⁰ Chace v. Vasquez, 11 Wheat. 429;

Perkins v. Fourniquet, 6 How. 206; Craighead v. Wilson, 18 How. 199; Humiston v. Stainthorp, 2 Wall. 106; Beebe v. Russell, 19 How. 283; Parsons v. Robinson, 122 U. S. 112, 7 Sup. Ct. Rep. 1153; Kane v. Whittick, 8 Wend. 219;

tains and fixes all the rights of the parties, but a reference is ordered to a master to do or ascertain something that is necessary to carry the decree into effect, if the functions of the master are to be merely *ministerial* and not judicial, or if all the consequential directions depending on the result of the proceedings before him are given in the decree itself, then the decree is final and not interlocutory.¹⁰¹ To take a single illustration,—the reference of a case to a master, to take an account upon evidence, and for the examination of the parties, and to make or refuse allowances affecting the rights of the parties, and to report his results to the court, is not a final decree. For his report is subject to exceptions from either side, which must be brought to the notice of the court before it can be available. It can

Johnson v. Everett, 9 Paige, 636; Chittenden v. Society, 8 How. Pr. 327; Cruger v. Douglas, 2 N. Y. 571; Tompkins v. Hyatt, 19 N. Y. 534; Templeman v. Steptoe, 1 Munf. 339; Ryan v. McLeod, 32 Gratt. 367; Mackey v. Bell, 2 Munf. 523; Price v. Nesbit, 1 Hill Ch. 445; Putnam v. Lewis, 1 Fla. 455; Griffin v. Orman, 9 Fla. 23; Owens v. Love, 9 Fla. 325; Garrard v. Webb, 4 Port. 73; Garner v. Prewitt, 32 Ala. 18; Broughton v. Wimberly, 65 Ala. 549; Cook v. Bay, 4 How. (Miss.) 485; Pryor v. Smith, 4 Bush, 379; Berryhill v. McKee, 3 Yerg. 157; Porter v. Burton, 10 Heisk. 584; Gaines v. Patton, 8 Ark. 67; Morris v. Morris, 5 Mich. 171; Caswell v. Comstock, 6 Mich. 391; Enos v. Sutherland, 9 Mich. 148; Gates v. Salmon, 28 Cal. 320.

¹⁰¹ Forgay v. Conrad, 6 How. 201; Beebe v. Russell, 19 How. 283; Thomson v. Dean, 7 Wall. 342; Mills v. Hoag, 7 Paige, 18, 31 Am. Dec. 271; Taylor v. Read, 4 Paige, 561; Dickenson v. Codwise, 11 Paige, 189; Coithe v. Crane, 1 Barb. Ch. 21; Harvey v. Branson, 1 Leigh, 108; Rawlings v. Rawlings, 75 Va. 76; Fleming v. Bolling, 8 Gratt. 293; Weatherford v. James, 2 Ala. 170; Bank v. Hall, 6 Ala. 141; McKinley v. Irvine, 18 Ala. 681; Hastie v. Aiken, 67 Ala. 318; Bradford v. Bradley, 37 Ala.

453; Cochran v. Miller, 74 Ala. 50; McFarland v. Hall, 17 Tex. 676; Merle v. Andrews, 4 Tex. 200; Meek v. Mathis, 1 Heisk. 534; *Ex parte* Crittenden, 10 Ark. 333; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Guardian Savings Bank v. Reiley, 8 Mo. App. 544; Damouth v. Klock, 28 Mich. 163; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508. The distinction above formulated is well brought out in a decision of Chancellor Walworth, from which we quote as follows: "A decree never can be said to be final when it is impossible for the party in whose favor the decision is made ever to obtain any benefit therefrom without again setting the cause down for hearing before the court, upon the equity reserved, upon the coming in and confirmation of the report of the master, to whom it is referred to ascertain certain facts which are absolutely necessary to be ascertained before the case is finally disposed of by the court, or which the chancellor thinks proper to have ascertained before he grants any relief whatever to the complainant. But if the decree not only settles the rights of the parties, but gives all the consequential directions which will be necessary to a final disposition of the cause, upon the mere confirmation of the report of the master by a common order in the regis-

only be made so by the court's overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment.¹⁰²

§ 45. Directing an Account.

According to the rules just stated, a decree directing an account to be taken is generally interlocutory; that is, unless all the steps to be taken after the account is ascertained are specifically prescribed in the decree, with no equities or questions reserved and no further directions needed. Thus, where a judgment appointed a referee who was to take an account of rents and profits and improvements upon land, and ascertain the present value of dower, and upon payment by the plaintiff of a certain sum to be ascertained by the referee in the mode specified in the judgment, the referee was to admeasure her dower, and he was to report the evidence taken by him with his findings thereon to the court, and all other questions were reserved until the coming in of such report and the final hearing thereon, it was held that this was not a final but an interlocutory judgment.¹⁰³

ter's office, it is a final decree and may be enrolled at the expiration of thirty days, although the amount to which the complainant may be entitled under such decree is still to be ascertained upon a reference to a master for that purpose. Thus, in the ordinary case of a bill for the foreclosure of a mortgage, if the decree merely decides or declares the rights of the complainant by virtue of his bond and mortgage, and refers it to a master to compute and ascertain the amount due to him, reserving all further questions and directions until the coming in and confirmation of the master's report, it is an interlocutory decree merely, as the complainant cannot obtain the benefit of his suit until he brings the cause on to be heard again upon the equity reversed and for further directions as to a sale of the mortgaged premises and the payment of his debt and costs out of the proceeds of such sale. But if the decree, in addition to the reference to

the master to compute the amount due upon the bond and mortgage, proceeds further and gives the usual directions in such cases, that upon the coming in and confirmation of the report of the master, the premises shall be sold, and that the master who makes such sale shall pay the amount so reported due, together with the interest and costs, out of the proceeds of such sale, and directing the mortgagor to pay the deficiency reported due upon such sale, the decree is final, although the mortgagor may have the right to except to the master's report of the amount due. For the questions arising upon the exceptions to the master's report, in such a case, are merely incidental to the carrying of the final decree in the cause into full effect." *Johnson v. Everett*, 9 Paige, 636.

¹⁰² *Beebe v. Russell*, 19 How. 283.

¹⁰³ *Raynor v. Raynor*, 94 N. Y. 248. See also *Jackson County v. Gullatt*, 84

§ 46. Decree suspending Rights until further Orders.

Another class of interlocutory decrees comprises those which prohibit a certain act to be done, or hold the rights of the parties *in statu quo*, until the court shall give further orders or directions. Thus an order that a party is not to pay a sum adjudged against him "until further ordered" is not final.¹⁰⁴ So a decree rendered by the probate court, upon the application of an executor, by which a certain amount is ascertained to be in his hands, a portion of which he is ordered to pay over to those entitled to it, and to retain the balance until the further order of the court, is not a final decree.¹⁰⁵

§ 47. Decree dissolving Partnership.

Where a bill in equity is brought for an accounting between partners and for a termination of the partnership, the first decree, dissolving the partnership and directing accounts to be taken, is generally only interlocutory.¹⁰⁶ But a decree dissolving a partnership, which directs an accounting and a sale of the firm's assets, and specifically states the manner of their distribution, is final.¹⁰⁷ Where, upon a bill for the settlement of partnership accounts, the decree leaves unsettled the equities as to two items of account, as to which a reference is ordered, it cannot be considered a final decree.¹⁰⁸

§ 48. Foreclosure of Mortgage.

Upon a bill for the foreclosure of a mortgage, if the decree ascertains the validity of the mortgage and the amount of the debt, orders a sale of the mortgaged premises, describing them, for satisfaction of such debt, directs that the sum due on the mortgage with in-

Ala. 243, 8 South. Rep. 906; Beebe v. Russell, 19 How. 283; Johnson v. Everett, 9 Paige, 636.

¹⁰⁴ Tinley v. Martin, 80 Ky. 463.

¹⁰⁵ Rhodes v. Turner, 21 Ala. 210.

¹⁰⁶ Gray v. Palmer, 9 Cal. 616; Kingsbury v. Kingsbury, 20 Mich. 212; Rhodes

v. Williams, 12 Nevad. 20; Huntington v. Moore, 1 New Mex. 471; Cocke's Adm'r v. Gilpin, 1 Rob. (Va.) 20.

¹⁰⁷ Clark v. Dunnam, 46 Cal. 204; Evans v. Dunn, 26 Ohio St. 439.

¹⁰⁸ Garner v. Prewitt, 33 Ala. 13.

terest and costs be paid over to the mortgagee out of the proceeds of the sale, and adjudges that the defendant make good any deficiency which may be found to exist after the sale, then the decree is final and complete; for it leaves nothing to be adjudicated or reviewed by the court.¹⁰⁹ But if the decree does not ascertain the amount due; or if it orders a sale but does not give any direction as to the disposition of the proceeds; or if it reserves the question of the distribution of the fund, in order to adjust conflicting claims or liens; or if, without ordering a sale, it directs the cause to stand continued for further order and decree upon the coming in of a master's report, then, and in any such case, it is merely interlocutory.¹¹⁰ New ground is taken in an Alabama decision, where it is held that a decree of foreclosure and sale, under a bill filed by a mortgagee, is partly final and partly interlocutory; that is, it is so far final that an appeal will lie from it, and it is also interlocutory in a limited sense, inasmuch as further proceedings are contemplated and necessary to carry it into effect.¹¹¹ But since interlocutory simply means "not final," it is difficult to perceive how any decree can be both one and the other at the same time.

§ 49. Sending Issue out of Chancery.

An order in equity sending an issue of fact to be tried in the law court is of course interlocutory. In itself it determines nothing. It is merely preparatory to a final decree.¹¹² And the same is true of a judgment rendered on a feigned issue directed out of chancery.¹¹³

¹⁰⁹ *Myers v. Manny*, 68 Ill. 211; *Morris v. Marange*, 88 N. Y. 172; *Baker v. Lehman*, Wright, 522; *Ray v. Law*, 8 Cranch, 179; *Whiting v. Bank of U. S.*, 18 Pet. 6; *Bronson v. Railroad*, 2 Black, 524; *Johnson v. Everett*, 9 Paige, 636. Compare *Allen v. Belches*, 2 Hen. & M. 595.

¹¹⁰ *Burlington, C. R. & N. R. Co. v. Simmons*, 128 U. S. 52, 8 Sup. Ct. Rep. 58; *Johnson v. Everett*, 9 Paige, 636.

¹¹¹ *Malone v. Marriott*, 64 Ala. 436.

¹¹² *Dabbs v. Dabbs*, 27 Ala. 646; *Eames v. Eames*, 16 Pick. 141.

¹¹³ *Woodside v. Woodside*, 21 Ill. 207.

CHAPTER III.

JUDGMENTS BY CONFESSION.

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§ 50. Confession of Judgment in Pending Suit.

All judgments rendered upon the confession of the defendant may be divided into two classes: 1. Those entered in an action regularly commenced by the issuance and service of process; 2. Those entered upon the confession of the defendant, or his warrant of attorney, without the institution of an action. The former class of judgments

are well known to the common law and must be tested and sustained by rules and principles existing independently of statutes, while judgments of the latter class derive all their efficacy from positive law and must conform, in order to be valid, to all the requirements and formalities set up by the legislature. It is frequently a matter of importance to determine whether a particular judgment belongs to one class or the other, because, if not covered by the statute, it is not impeachable for lack of an affidavit, statement of indebtedness, or other support required by the act. This distinction is recognized by the authorities. Thus a statute which provides that any person may, without process, appear in person or by attorney and confess judgment for any *bona fide* debt, but in such case a petition shall be filed, and other acts be done, does not apply to cases where the party is regularly cited, but only to cases of voluntary appearance without process.¹ So where a defendant accepts service of process and afterwards confesses judgment, the plaintiff's affidavit of the justness of the claim, required in the case of confession without action, is held to be unnecessary.² Now judgments entered for the plaintiff upon the defendant's admission of the facts and law, as the same are known to the common law and exist independently of statutes, are of two varieties; first, judgment by *cognovit actionem*, and second, by confession *relicta verificatione*. In the former case the defendant, after service, instead of entering a plea, acknowledges and confesses that the plaintiff's cause of action is just and rightful. In the latter case, after pleading and before trial, the defendant both confesses the plaintiff's cause of action and withdraws or abandons his plea or other allegations, whereupon judgment is entered against him without proceeding to trial.³ In order to sustain a judgment of either of these sorts, it is essential that process, regularly issued, should have been served upon the defendant (though he may *accept* service with the same effect as if the writ had been served as it usually is⁴); and an agreement in writing made out of court, authorizing the clerk to enter up such a judgment, will not sustain it, where there has been

¹Schroeder v. Fromme, 31 Tex. 602.
And see Crouse v. Derbyshire, 10 Mich.
479, 82 Am. Dec. 51.

²Gerald v. Burthee, 29 Tex. 203.

³Bouvier, Law Dict., voc. *Judgment*.

⁴Gerald v. Burthee, 29 Tex. 203.

no appearance by the defendant.⁶ A judgment by *cognovit*, after process has been served, may be entered in vacation, without a judge's or commissioner's order, and without affidavits.⁶ The other species of judgment by confession, *relicta verificatione*, is also not unknown to modern practice. Thus, where a judgment recited that "the defendants, by leave of court, withdraw their pleas and say that they cannot deny the plaintiff's cause of action against them, for debt and interest in plaintiff's petition claimed," it was held that this was in effect a confession of judgment, and a jury was not required to ascertain the amount.⁷ It is also said that where a party confesses judgment against himself under a mistake of fact as to what the pleadings contain, he may, upon discovering his error, retract the confession, provided it has not been recorded.⁸

§ 51. Confession of Judgment without Action.

One method of confessing a judgment without action or process is by a warrant of attorney. This is an authority given by the debtor to a named attorney, or to any attorney of a given court or in a given jurisdiction, empowering him to appear for the defendant and confess judgment for a designated amount. This differs from a *cognovit* in that an action must be commenced before a *cognovit* can be given, but not before the execution of a warrant of attorney.⁹ In so far as this procedure may be regulated by statute in any jurisdiction, it must of course comply strictly with the requirements of the law. But in most of the states there are statutes which authorize a judgment to be entered upon the confession of the defendant, without action, upon the filing of a verified statement showing the facts out of which the indebtedness arose, and an affidavit that the debt is just and actual, and sometimes upon the observance of certain additional formalities. This is by far the most usual method of confessing judgments, and therefore will principally engage our attention in this chapter.

⁶ Craig v. Glass, 1 Smith (Ind.) 27. But see Shadrack v. Woolfolk, 32 Gratt. 707.

⁸ Stewart v. Walters, 38 N. J. L. 274.

⁷ Burton v. Lawrence, 4 Tex. 373. And see Hicks v. Ayer, 5 Ga. 298.

⁸ Smith v. Simms, 9 Ga. 418.

⁹ Bouvier, Law Dict., voc. *Judgment*.

§ 52. Authorized by Statutes.

Inasmuch as the proceeding last adverted to depends entirely upon statute for its validity, it is evident that a strict construction must be applied to the statute and that its provisions must be strictly complied with in using the authority it grants.¹⁰ But on the other hand, the judgment must stand or fall by the statute alone, and formalities not therein required are not essential to its validity. For instance, it is not necessary to sustain such a judgment that a declaration should have been filed; the statement required by the statute is sufficient.¹¹ Again, neither a citation of the defendant nor a previous judgment of default is needed as a preliminary to the entry of judgment on his confession.¹² But in some states it is required that an office confession of judgment be confirmed by the court before it becomes a judgment; and under this rule its incidents as a judgment do not attach until the date of such confirmation.¹³ So, again, a provision that the confession must be signed by the party and by witnesses does not admit of evasion.¹⁴ And the same is true of a requirement that the debtor shall appear in person and confess the judgment.¹⁵ Since a judgment upon confession is not in the nature of an adversary proceeding, it is theoretically immaterial whether it is entered during a session of the court or in vacation. And it may be stated as the rule, unless modified by the particular statute, that a judgment of this character may as well be entered in vacation as in term-time.¹⁶ So a warrant of attorney attached to a note authorizing confession of judgment thereon at any time after its date, will support a judgment entered in vacation before the note was due.¹⁷ And a judgment confessed in the clerk's office on the morning of the

¹⁰ *Edgar v. Greer*, 7 Iowa, 186; *Chapin v. Thompson*, 20 Cal. 686.

¹¹ *Johnston v. Glasgow*, 5 Ark. 811; *Choat v. Bennett*, 11 Ark. 818; *Gayle v. Foster*, Minor, 125; *Matthews v. Thompson*, 8 Ohio, 272.

¹² *Marbury v. Pace*, 29 La. Ann. 557.

¹³ *Bass v. Estill*, 50 Miss. 300.

¹⁴ *Beach v. Botsford*, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45.

¹⁵ *Rosebrough v. Ansley*, 85 Ohio St. 107. See *Reed v. Hamet*, 4 Watts, 441.

¹⁶ *Pickett v. Thurston*, 7 Ark. 397; *Kellogg v. Keith*, 4 Ill. App. 386.

¹⁷ *Towle v. Gonter*, 5 Ill. App. 409. But it is said that a judgment cannot be confessed on the day a warrant of attorney and note bear date, although the note is payable on demand. *Waterman v. Jones*, 28 Ill. 54.

first day of the term of court, before the court was opened, is a valid judgment.¹⁸

§ 53. Court must have Jurisdiction.

Although a judgment by confession is to a certain extent founded on the agreement of the parties, instead of a direct adjudication by the court, it is none the less, on that account, a judicial act. And since their consent cannot create a jurisdiction in excess or contravention of that conferred by law, it is equally essential to the validity of a judgment of this character as to any other that it be entered in a court having jurisdiction of the subject-matter. As it is to have all the incidents and consequences of any other judgment, and to have the sanction of the law and the authority of the court behind it, it will be invalid unless the court where it is entered might lawfully have rendered the same judgment in a contested action.¹⁹ And where the authority of an inferior court, as that of a justice of the peace, to enter judgments upon confession, is limited by law or hedged round with prescribed formalities, it must clearly appear upon the face of his record that the particular confession came within the limitations and that the requirements of the statute were distinctly met and complied with.²⁰ Yet after a confession of judgment without exception to the jurisdiction of the particular court (the subject-matter being within its general competence), the judgment rendered is valid.²¹ And a judgment entered in the district court, by virtue of a warrant of attorney authorizing the entry of such judgment in the court of common pleas, those courts having concurrent jurisdiction, cannot be set aside as erroneous at the instance of a subsequent judgment-creditor.²² Such authority, however, will not run into another state. Thus a warrant

¹⁸ *Brown v. Hume*, 16 Gratt. 456.

¹⁹ *Lanning v. Carpenter*, 23 Barb. 402. So where it is required by law that the execution of a power of attorney to confess judgment be proved before the judgment is confessed, such proof must affirmatively appear of record; otherwise the court would have no jurisdiction of the person of the maker, and

the judgment would be invalid. *Rapley v. Price*, 9 Ark. 428.

²⁰ *Spear v. Carter*, 1 Mich. 19, 48 Am. Dec. 688; *Tenny v. Filler*, 8 Wend. 569; *Camp v. Wood*, 10 Watts, 118.

²¹ *Lyons v. Kelly*, (La.) 4 South. Rep. 480.

²² *Hauer's Appeal*, 5 Watts & S. 478.

of attorney to confess a judgment, executed in one state between parties residing there and by its terms to be rendered there, will not support a judgment entered in another state.²³ Authority to confess judgment under a power of attorney is not exhausted by a confession of a judgment which is subsequently reversed, but another may be confessed under the same power. "The intention of the power had not been carried out, consequently the object was not accomplished, and the authority was not exhausted by the first act."²⁴ A more difficult question arises in the case where a judgment by confession is entered upon a bond and warrant of attorney in one county, and afterwards, such judgment remaining in force and unsatisfied, a second judgment upon the same bond and warrant is entered in another county. Here it would seem that the authority conferred by the warrant was fully satisfied by the first confession and nothing remained to sustain the second. But since this would not appear upon the face of the proceedings, the second judgment would not be absolutely void, but at most irregular. It would be vacated or set aside upon application to the court in which it was entered, but the want of authority to enter the second judgment could not be taken advantage of on a writ of error. In the mean time, if a sheriff's sale was had under the second judgment, the purchaser would no doubt take a good title; but in that case the attorney who entered the judgment, or the obligee of the bond, if it was entered by him, would be answerable.²⁵

§ 54. Who may confess Judgment.

As a general rule, any person may give a confession of judgment against whom the same judgment might lawfully have been pronounced by the court as the result of a suit regularly instituted and contested. The only difficulty occurs in the case of persons who are

²³ *Bank v. Boyd*, 3 Denio, 257. But a judgment upon the confession of the defendant which is valid in the state where it is entered is equally valid in every other state. *Coleman v. Waters*, 18 W. Va. 278.

²⁴ *Huner v. Doolittle*, 3 Greene (Iowa), 76, 54 Am. Dec. 489.

²⁵ *Martin v. Rex*, 6 Serg. & R. 296; *Neff v. Barr*, 14 Serg. & R. 166; and see also *Lively v. Pennock*, 2 Browne (Pa.) 321.

under disabilities; and here it must be remarked that if the disability of infancy or coverture is merely a personal privilege which may be waived, then the confession of a judgment is as explicit a waiver as could well be imagined, but if, on the other hand, it is regarded as an absolute incapacity to contract debts, or certain kinds of debts, then a confession of judgment is merely a futile attempt to give validity to that which by law can have none. It has been said that a warrant of attorney to confess judgment executed by a minor is under all circumstances entirely void.²⁶ But this statement is probably too strong. The marked tendency of the authorities, as we shall see hereafter,²⁷ is to regard a judgment against an infant duly before the court as valid and effectual for all purposes, unless indeed time is given to him to show cause against it after his majority. And if his defense of infancy is taken away by his failure to duly plead it when sued, it is certain that it is equally waived by his voluntary confession of judgment. The case of confessions by married women we reserve for the succeeding section.

In regard to parties plaintiff in confessions of judgment the parallel rule applies. Thus a person may confess a judgment for a sum of money to the state as well as to an individual.²⁸ In cases where the debtor is an officer of the court in which the confession is entered, no difficulty has been experienced in sustaining the judgment. Thus, under a statute providing that judgments may be confessed in the clerk's office, and when recorded by him shall be valid, the clerk, acting as a ministerial officer, may enter a judgment by confession against himself.²⁹ And it is even held that a judge, in a suit in his own court to which he is a party, may confess a judgment against himself.³⁰ Of course any person who may himself give a valid confession of judgment may delegate his power to that intent to another. Such authorization of a third person is commonly seen in warrants of attorney, but may also be otherwise conferred. The authority of an attorney appearing in open court, it is said, will be presumed to be regular until the contrary is shown, but in vacation his authority to confess judgment

²⁶ *Knox v. Flack*, 22 Pa. St. 387.

²⁷ See *infra*, §§ 198, 199.

²⁸ *State v. Love*, 1 Ired. 264.

²⁹ *Smith v. Mayo*, 83 Va. 910, 5 S. E. Rep. 276.

³⁰ *Thornton v. Lane*, 11 Ga. 459.

must affirmatively appear and no presumption will be indulged in favor of it.²¹ On the same general principle, an agent, within the scope of his authority, may confess judgment against his principal.²² If the agent transcends his authority and confesses judgment for a sum greater than is actually due, it may be a question whether the principal is bound at all. But it has been held that in such a case, the judgment is valid for the real debt and void only as to the excess.²³ It is also held that a trustee cannot bind the trust estate by a confession of judgment.²⁴

§ 55. Confession by Married Woman.

In regard to the power of a married woman to bind herself by a confession of judgment, we find the greatest difference of opinion in the authorities. In fact it is impossible to formulate a general rule; the question must ultimately be referred to the statutes in the several states regulating her status and rights. In proportion as the *feme covert* is emancipated from the rigors of the common law, her power to confess judgment increases in respect to the variety of obligations upon which it may be exercised. The only safe generalization seems to be, that she cannot confess a judgment for any debt for which she could not be made liable by judgment rendered *in invitum*. In Pennsylvania, the bond of a married woman, though she join in it with her husband, is held to be absolutely void, and a judgment entered on such bond by virtue of a warrant of attorney annexed thereto, executed by the wife together with her husband, is also void as respects the wife and her estate.²⁵ According to the late authorities,

²¹ *Martin v. Judd*, 60 Ill. 78. See *Jarrett v. Andrews*, 19 Ind. 408.

²² *Parker v. Poole*, 12 Tex. 86. A municipal officer, liable to suit on a contract made by him on behalf of the public, may confess judgment for the amount due. *Gere v. Supervisors*, 7 How. Pr. 257. A judgment against a vessel as a substantive party and her owners, by confession of the master of the boat, is erroneous. *Wassell v. English*, 17 Ark. 480.

²³ *Davenport v. Wright*, 51 Pa. St. 292.

²⁴ *Mallory v. Clark*, 20 How. Pr. 418.

²⁵ *Dorrance v. Scott*, 8 Whart. 309, 81 Am. Dec. 509; *Graham v. Long*, 65 Pa. St. 888; *Caldwell v. Walters*, 18 Pa. St. 79, 55 Am. Dec. 592; *Keiper v. Helfrick*, 42 Pa. St. 825; *Keen v. Coleman*, 89 Pa. St. 299, 80 Am. Dec. 524; *Brunner's Appeal*, 47 Pa. St. 67; *Finley's Appeal*, 67 Pa. St. 453; *Swayne v. Lyon*, 67 Pa. St. 436; *Steinman v. Ewing*, 43 Pa. St. 63; *Glyde v. Keister*, 32 Pa. St. 85;

there is but one exception to this rule, viz, in the case where the note upon which the judgment is confessed is given for the purchase-money of land conveyed to her, and forms part of the transaction; the judgment will then be a valid lien against the land, though not a charge against the woman personally.³⁶ On the other hand, where a statute gives to married women the right to sue and be sued in the same manner as if sole, a married woman may confess a judgment to secure a debt contracted by her, and for her use and benefit, in carrying on her separate business.³⁷ In other jurisdictions, the statute, while enabling a married woman to enter into certain classes of engagements, forbids her to make agreements or contract debts of other kinds. Under this system, "if the contract of the married woman be such as a married woman is still incapacitated from entering into, her warrant of attorney to enter judgment upon it is a nullity, because the obligation to which the warrant of attorney is annexed is invalid, and judgment entered in pursuance of it will be vacated.³⁸ But if the contract be one that the married woman is enabled to make, and on which she may be sued at law, I think a different result must be reached. With respect to such contracts, any action, suit, or proceeding which is adopted for the enforcement of the obligation is within the reason and spirit of the statutes which confer the capacity

Shallcross v. Smith, 81 Pa. St. 183. But now in Pennsylvania by the Act of June 3, 1897, § 2 (P. L. p. 383), "a married woman shall be capable of entering into and rendering herself liable upon any contract relating to any trade or business in which she may engage, or for necessities, and for the use, enjoyment, and improvement of her separate estate, and for suing and being sued, either upon such contracts or for torts done to or committed by her, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action, suit, or legal proceeding of any kind brought by or against her in her individual right." This statute is construed, with reference to confessions of judgment,

in the late case of *Roop's Appeal* (Pa.), 19 Atl. Rep. 278.

³⁶ *Christner v. Hochstetler*, 109 Pa. St. 27; *Quinn's Appeal*, 86 Pa. St. 447; *Brunner's Appeal*, 47 Pa. St. 67. See also *Thornhill v. State Nat. Bank*, 84 La. Ann. 1171.

³⁷ *First Nat. Bank v. Garlinghouse*, 53 Barb. 615. See Code Civ. Proc. N. Y. § 1273. Compare *Watkins v. Abrahams*, 24 N. Y. 72. A judgment confessed by a married woman is not void but voidable merely, and her husband, if he assented to the sale of property under an execution thereon, is estopped from afterwards claiming it adversely. *Roraback v. Stebbins*, 4 Abb. App. Dec. 100, S. C. 38 How. Pr. 278.

³⁸ *Swing v. Woodruff*, 12 Vroom, 469.

to contract and impose liability to actions at law thereon. The obligation being valid, the warrant of attorney is simply a part of the procedure to enforce it—as much so as a suit by summons or a *cognovit*.³⁹ A confession of judgment by a married woman, which condemns her to pay her husband's debt, is void. Such a confession is "but the complement or consummation of a contract which the law prohibits, and which was consequently null."⁴⁰

It has been held that although a judgment entered upon the confession of a married woman may be invalid, yet it is too late to raise that objection to the judgment after the same has been duly revived by proper proceedings. For the defendant had an opportunity to show cause against the judgment at the time of its revival, and its validity was impliedly adjudicated in that proceeding; for there can be no judgment of revival until it is determined that there is a valid judgment.⁴¹ This proposition, however, has been denied.⁴² And indeed, if the particular judgment was one which the woman had absolutely no power to confess, so that it must be held to be a mere nullity, it is difficult to see how any vitality could be imparted to it by the mere fact of revival. No action will lie upon a void judgment. And a judgment of revival, passed upon a nugatory cause of action, is, equally with the judgment revived, merely void.

Another question not without difficulty, which arises in reference to this subject, is in relation to a judgment entered against both husband and wife upon a warrant of attorney executed by them jointly. It has been held that such a judgment, though void as to the wife, will stand valid as against the husband.⁴³ But there are numerous cases holding that a judgment is an entirety, and if void as to one defendant is void as to all;⁴⁴ and these decisions would seem to ap-

³⁹ *Heywood v. Shreve*, 44 N. J. Law, 94. See further *Stevens v. Dubarry*, Minor, 879; *Baines v. Burbridge*, 15 La. Ann. 628; *Dancy v. Martin*, 23 La. Ann. 323; *Henchman v. Roberts*, 2 Harringt. 74; *Mendenhall's Exrs. v. Springer*, 8 Harringt. 87; *Patton v. Stewart*, 19 Ind. 233; *Harris v. Jenkins*, 72 N. Car. 183; *Wallace v. Rippon*, 2 Bay, 112.

⁴⁰ *Baines v. Burbridge*, 15 La. Ann.

628; *Edwards v. Edwards*, 29 La. Ann. 597.

⁴¹ *Crenshaw v. Julian*, 26 S. Car. 283, 2 S. E. Rep. 133.

⁴² *Dorrance v. Scott*, 8 Whart. 309, 31 Am. Dec. 509.

⁴³ *Shallcross v. Smith*, 81 Pa. St. 133; *Wallace v. Rippon*, 2 Bay, 112.

⁴⁴ See *infra*, § 211. And see, as to judgments by confession, specifically,

ply with equal weight whatever may be the ground of the invalidity. It seems certain, however, that a married woman may confess a judgment for a valid ante-nuptial debt, and such judgment will be conclusive and enforceable against her as if rendered by default or upon a verdict.⁴⁵ And a warrant of attorney to confess judgment, given by a *feme sole*, is not revoked by her subsequent marriage, and after such marriage judgment may be entered up on it against the husband and wife jointly, leave being obtained on motion.⁴⁶

§ 56. Married Woman as Creditor.

A married woman may *take* a confession of judgment, as sole plaintiff, in any case where she could sue for the debt alone, or jointly with her husband in a case where they have a joint right of action. Thus, where a bond and warrant of attorney was given to a woman *dum sola*, and she afterwards married, the court, upon affidavit of the fact, allowed judgment to be entered in favor of Husband and wife together.⁴⁷ The indebtedness of a husband to his wife, by note or for money or property, is a sufficient consideration to support a judgment confessed by him in the wife's favor as against his other creditors, when not impeached for fraud.⁴⁸ And such a judgment, admitted to be honest, will not be treated as void in law or equity because of the legal unity of the parties; and the relation not appearing in the record, the court will not, at the instance of creditors, inquire into the fact of coverture, when no fraud is alleged.⁴⁹

§ 57. Confession by Partner.

A member of a firm has no authority, by virtue of his mere relation to the partnership or his general power to act as its agent, to

Mendenhall's Exra. v. Springer, 3 Harringt. 87.

⁴⁵ Travis v. Willis, 55 Miss. 557.

⁴⁶ Baker v. Lukens, 85 Pa. St. 146; Eneu v. Clark, 2 Pa. St. 234, 44 Am. Dec. 191; Bering v. Burnet, 2 Clark (Pa.), 399.

⁴⁷ Sheble v. Cummins, 1 Browne (Pa.), 252.

⁴⁸ Thomas v. Mueller, 106 Ill. 86. *Per contra*, Countz v. Markling, 30 Ark. 17.

⁴⁹ Williams' Appeal, 47 Pa. St. 307.

confess a judgment against the firm; and if judgment be entered on such a confession, it will be void as against his co-partners, though binding as a personal charge upon himself.⁵⁰ And a confession of judgment under seal, in the name of a partnership and of a member of the firm, is binding only upon such member.⁵¹ So a confession of judgment by a former partner against the firm, while good as against the partner confessing it, will not bind property assigned by the firm to a remaining partner under terms of agreement to pay firm debts.⁵²

§ 58. Joint Defendants.

In a pending action against two defendants, one of them cannot in the absence of the other, confess judgment against both; and a judgment rendered against both on the confession of one only, without evidence, will be set aside.⁵³ And where one of several joint defendants confesses judgment so far as concerns himself, such judgment is only interlocutory until the final decision of the cause as to the rest; and the confessing defendant must ultimately receive the same judgment as his co-defendants.⁵⁴ In the case of a confession of judgment without action, a question has sometimes arisen as to the effect of an authority for such judgment—whether a warrant of attorney or a statement of indebtedness—which is signed by only a part of the defendants against whom it directs the judgment to be entered. As against those not signing the authority, the judgment is certainly of no force whatever. But whether it may stand as a valid obligation against those who did sign, is not so clear. In one state it is held, on the principle that a judgment is an entirety, that if the warrant authorizes the entry of judgment against a certain number, no judg-

⁵⁰ *Blitzer v. Shunk*, 1 Watts & S. 840, 37 Am. Dec. 469; *York Bank's Appeal*, 36 Pa. St. 458; *Soper v. Fry*, 37 Mich. 236; *Christy v. Sherman*, 10 Iowa, 535; *Hopper v. Lucas*, 86 Ind. 43; *Crane v. French*, 1 Wend. 311; *Mills v. Dickson*, 6 Rich. 487; *Richardson v. Fuller*, 2 Oreg. 179; *Stoutenburg v. Vandenburg*, 7 How. Pr. 229; *Elliott v. Holbrook*, 33 Ala. 659; 1 *Lindley on Partn.* 474.

⁵¹ *Appeal of Perth Amboy Terra-Cotta Co.*, (Pa.) 17 Atl. Rep. 4.

⁵² *Mair v. Beck* (Pa.), 3 Atl. Rep. 218; *McCleery v. Thompson*, (Pa.) 18 Atl. Rep. 785.

⁵³ *Wiggins v. Klienhaus*, 9 N. J. Law, 249; *Ballinger v. Sherron*, 14 N. J. Law, 144.

⁵⁴ *Taylor v. Beck*, 3 Rand. 316.

ment can be entered against a less number, and it is void as to all.⁵⁵ But other cases hold, and we think with better reason, that the judgment entered will bind those who subscribed the warrant, though nugatory as to the others.⁵⁶

§ 59. By Officers of a Corporation.

In regard to the confession of a judgment against a corporation, the rule appears to be, that such confession may be made by any officer or agent of the company upon whom a summons might have been served, in a contested action, with the effect to bind the corporation by the result of the subsequent proceedings.⁵⁷ Upon a confession of judgment by a corporation, the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question and not open to collateral attack.⁵⁸

§ 60. Consent of Creditor is necessary.

A judgment based upon a confession made without any request on the part of the creditor, and without his knowledge and consent, or against his consent, and entered at the instance of the debtor alone, will have no effect in advance of the creditor's acceptance of it; it is voidable, it will not bar an action brought by the creditor, nor will it estop the debtor from denying the facts set forth.⁵⁹ This

⁵⁵ Chapin v. Thompson, 20 Cal. 681.

⁵⁶ North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441. See Knox v. Bank, 57 Ill. 330; York Bank's Appeal, 36 Pa. St. 458.

⁵⁷ Miller v. Bank, 2 Oreg. 291. But another case holds that a judgment confessed by the president of a corporation without service of process and without

the order or knowledge of the directors or company, and not setting forth the cause of indebtedness, is void. McMurray v. St. Louis, etc., Co., 33 Mo. 377.

⁵⁸ White v. Crow, 17 Fed. Rep. 98.

⁵⁹ Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66; Farmers' & Mechanics' Bank v. Mather, 30 Iowa, 283; In-

rule proceeds upon the very obvious consideration that if the assent of the creditor were not necessary to a confessed judgment, the debtor might, by confessing for only a part of the real debt, preclude his creditor from recovering the residue. For a judgment by confession is as conclusive as any other;⁶⁰ and if it include only a portion of an indivisible demand, no action will lie for the balance. A judgment so entered, unknown to the creditor or against his will, is therefore voidable at his option, and will be vacated on his motion.⁶¹ But on the other hand, he may ratify the debtor's action and accept the judgment, and when he does this, it will have the effect to validate the judgment and place it on the same footing in all respects with one sanctioned by his previous knowledge and consent. The validation of the judgment, however, dates only from its acceptance by the creditor, and it will not affect the priority of other creditors who came in between the entry of the judgment and its ratification.⁶² The creditor's assent to the entry of judgment may also be constructive. Thus it is sufficient if done with the knowledge and consent of his attorney in whose hands he has placed the matter.⁶³ So also, if an action is already pending. Where the creditor has brought suit for a specified sum of money upon a certain claim, and the debtor appears in court and confesses judgment for the amount claimed and costs, the assent of the plaintiff will be presumed; and to entitle him to have the judgment set aside, he must make it appear to the court that he has been prejudiced by such confession.⁶⁴ It is held that the confession of a judgment by the defendant in a pending suit, after the death of the plaintiff and before substitution of his representatives, is void, both as regards the representatives of the plaintiff and any third person who may be collaterally interested in the payment of the same.⁶⁵

gersoll v. Dyatt, 1 Miles (Pa.) 245; *Chaplin v. McLaren*, 105 Ind. 563, 5 N. E. Rep. 688.

⁶⁰ See *infra*, vol. 2, § 698.

⁶¹ *Farmers' & Mechanics' Bank v. Mather*, 30 Iowa, 283.

⁶² *Wilcoxson v. Burton*, 27 Cal. 228. 67 Am. Dec. 66.

⁶³ *Chaplin v. McLaren*, 105 Ind. 563, 5 N. E. Rep. 688.

⁶⁴ *Flanigan v. Continental Ins. Co.*, 23 Nebr. 235, 34 N. W. Rep. 367; *McCalmont v. Peters*, 18 Serg. & R. 196.

⁶⁵ *Finney v. Ferguson*, 3 Watts & S. 413. Compare *Lewis v. Rappelyea*, 1 Barb. 29.

§ 61. Requisites of Warrant of Attorney.

As already stated, it is the practice in some states to enter confessed judgments upon a written authority, called a warrant or letter of attorney, by which the debtor empowers an attorney to enter an appearance for him, waive process, and confess judgment against him for a designated sum. This warrant should contain the grant of authority clearly and distinctly given, and a designation of the person by whom it is to be exercised, either by name or description.⁶⁶ It is usual, however, to confer the authority upon "any attorney" of a particular court or "any attorney of any court of record" in the particular state. Where the warrant authorizes A., or any other attorney of the court in which the judgment is to be confessed, to appear and make the confession, and A. and B., both attorneys of that court, appear together, the judgment will be valid.⁶⁷ The warrant should specifically state its purpose. But the words used are not of the least importance, and it is held that a warrant to "enter" judgment will be considered as equivalent to a warrant to "confess" judgment.⁶⁸ And in a case where the warrant was written upon a printed form of a judgment-note, and the blanks in that part of the note which related to the entry of judgment were not filled out, but the note was otherwise regular, it was held that the warrant was not void.⁶⁹ It also appears that a warrant of attorney to confess judgment need not be under seal.⁷⁰ Of course if the warrant is annexed to or incorporated in a note or bond, the debt on which it is based will be sufficiently disclosed. But in any other case the cause of action must be described either in a declaration, a sworn statement, or in the warrant of attorney itself.⁷¹ This is required as an evidence of good faith and for the information of other creditors. A judgment so confessed is not necessarily void although the warrant of attorney be void; and such a judgment, it is held, after it has been revived against the debtor's administrator, cannot be set aside for that cause, although

⁶⁶ *Rabe v. Heslip*, 4 Pa. St. 189. See *Grubbs v. Blum*, 63 Tex. 426.

⁶⁷ *Patton v. Stewart*, 19 Ind. 288.

⁶⁸ *Mason v. Smith*, 8 Ind. 73.

⁶⁹ *Sweezy v. Kitchen*, 80 Pa. St. 160.

⁷⁰ *Kneedler's Appeal*, 92 Pa. St. 428.

⁷¹ *Gambia v. Howe*, 8 Blackf. 183.

the defect in the warrant might have been pleaded in avoidance or given in evidence under a plea of *nul tiel record*.⁷³ The warrant of attorney, as the basis of the judgment, must also be placed on file in the clerk's office, and no judgment can be entered on it before it is actually so filed.⁷³ In some of the states, it is necessary that proof should have been made of the execution of the warrant of attorney before the judgment is confessed, and in the case of a confession out of court, this must affirmatively appear of record, but where the confession is in open court, the evidence of that fact need not be presented in the record, but it will be presumed to have been done unless it appears to have been omitted.⁷⁴

§ 62. Affidavit that Debt is due.

Under the various statutes regulating the practice in confessing judgments, it is almost invariably required that the debtor's confession be accompanied by an affidavit showing the *bona fides* of the transaction. In some jurisdictions this is directed to be incorporated in the statement which forms the basis of the judgment; in others it is to be a separate document. The statute usually prescribes the form of words, as that the debt is "justly due and owing," or is "justly due or to become due." A provision of this character, however, is satisfied by a substantial compliance with the meaning of the law, and if the affidavit details facts which show that the debt is really just and actually due, it is enough, though the words of the statute be not employed. Thus, the affidavit is sufficient in form in stating that the debt is "justly and honestly due," instead of "due and owing" in the words of the statute, when a present indebtedness is shown.⁷⁵ Nor is it required that the affidavit go beyond the statute. Hence it

⁷³ Wood v. Ellis, 10 Mo. 382.

⁷⁴ Chambers v. Dente, 2 Pa. St. 421.

⁷⁵ Iglehart v. Chicago Ins. Co., 35 Ill. 514; Anderson v. Field, 6 Ill. App. 307; Gambia v. Howe, 8 Blackf. 188. A judgment cannot be confessed on a warrant of attorney which had been executed more than a year and a day, unless an affidavit is filed, showing that

the maker is alive, and that the debt or some portion of it is still due, and a rule of court or an order of a judge in vacation must be obtained granting leave. Hinds v. Hopkins, 28 Ill. 344.

⁷⁶ Mulford v. Stratton, 41 N. J. Law, 466; Reading v. Reading, 24 N. J. Law, 358.

is not necessary for the debtor to deny, in specific terms, that the debt has been paid, released, barred, or discharged.⁷⁵ A judgment entered upon confession without the affidavit required by statute is voidable only, not void, and it cannot on that ground be collaterally attacked by a stranger to the record.⁷⁶

§ 63. Statement of the Indebtedness.

The statutes require a person confessing a judgment to file a written statement, signed and sworn to, designating the amount for which the judgment is to be entered, and "stating concisely the facts out of which the indebtedness arose."⁷⁷ The designation of the amount of the debt is a vital part of a valid confession; it must be set forth explicitly and not be left to inference; and the omission of it is a fatal defect.⁷⁸ The requirement that the facts be stated is intended to enable other creditors to test the *bona fides* of the transaction by which a particular debt is preferred. In construing a provision of this character, a learned judge has said: "I do not think it can properly be said that the object of the statute was to compel the debtor to state sufficient of the transaction out of which the indebtedness arose to enable other creditors to form an opinion *from the facts stated* as to the integrity of the debtor in confessing the judgment. If the debt is questioned, it is not to be presumed that the creditor questioning will take the debtor's statement, however full. What the creditor wants, and what I think the statute intended he should have, is sufficient of the facts to enable him to inquire into the transaction, and to form his opinion of the honesty of the judgment from the facts *he shall ascertain*."⁷⁹ To come to specific illustrations,—it is held that a recital in the statement that the indebtedness accrued for "borrowed money" or "money loaned" to the

⁷⁵ *Lanning v. Carpenter*, 20 N. Y. 447.

⁷⁷ *Den dem. Vanderveere v. Gaston*, 24 N. J. Law, 818.

⁷⁸ *Winnebrenner v. Edgerton*, 80 Barb. 185; *Lanning v. Carpenter*, 20 N. Y. 447.

⁷⁹ *Clements v. Gerow*, 80 Barb. 325.

⁸⁰ *McDowell v. Daniels*, 88 Barb. 143,

Sutherland, J. Another way of stating the degree of certainty required is, that the confessed judgment may be pleadable in bar of a future demand for the same thing. *Wight v. Mott, Kirby*, 153.

debtor, sufficiently states the facts out of which the indebtedness arose.⁸¹ Another authority, drawing the line more strictly, holds that a statement that the indebtedness "is for a debt justly due from me to said plaintiff for moneys to that amount loaned and advanced to me by said plaintiff," is sufficient as between the parties, though it might be voidable at the instance of a junior judgment-creditor or *bona fide* purchaser.⁸² Probably it is necessary to state the date of the loan. But if the whole sum is made up of various items advanced at different times, the cases rule that the statement is sufficiently explicit in describing the money as loaned to defendant at divers times after a specified day.⁸³ A confession of judgment for a certain sum for "goods, wares, and merchandises" of a specified value, is held by some of the authorities, to be too indefinite; it should state the nature and quantity of the goods sold, the time of sale, and the aggregate price, if not even the price of the several items.⁸⁴ But in New York a much looser rule obtains. It is there held to be well enough if the indebtedness is stated to be for goods, wares, and merchandise sold and delivered, with an approximate description of the period at or within which the sale took place.⁸⁵ A statement is not sufficient if it merely states and sets out a promissory note executed by the defendant to the plaintiff as the consideration of the indebtedness; for the facts out of which the indebtedness evidenced by the note arose should be clearly stated.⁸⁶ But a statement which sets out the execution and delivery "for value" of a negotiable note for \$1500, "for money which" the creditor "then and there gave" the debtor "for said note, as a loan, which sum of \$1500 is justly due and owing according to the tenor and effect of said note herein

⁸¹ Kern v. Chalfant, 7 Minn. 487, (Gil. 393); Kendig v. Marble, 58 Iowa, 529, 12 N. W. Rep. 584, citing Vanfleet v. Phillips, 11 Iowa, 558; Miller v. Clark, 37 Iowa, 325.

⁸² Terrett v. Brooklyn Improvement Co., 18 Hun. 6. Compare Wood v. Mitchell (N. Y.) 23 N. E. Rep. 1125.

⁸³ Frost v. Koon, 80 N. Y. 428; Johnston v. McAusland, 9 Abb. Pr. 214. See Davis v. Morris, 21 Barb. 152.

⁸⁴ Nichols v. Criba, 10 Wis. 76; Lawless v. Hackett, 16 Johns. 149; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107.

⁸⁵ Read v. French, 28 N. Y. 285; Neubaum v. Keim, 24 N. Y. 325; Delaware v. Ensign, 21 Barb. 85.

⁸⁶ Chappel v. Chappel, 12 N. Y. 315, 64 Am. Dec. 496; Davidson v. Alexander, 84 N. Car. 621; Pond v. Davenport, 44 Cal. 481; McHenry v. Shephard, 2 Mo. App. 378.

described," is sufficient to satisfy the statute.⁸⁷ But a statement that the note was "given for goods sold and delivered and money had and received" is not sufficient.⁸⁸ And an allegation that the consideration of the judgment is a promissory note given by the debtor for value received, but not specifying the amount or consideration of the note, is defective.⁸⁹ So if it is merely stated that the note was for "money due," the judgment entered upon it is *prima facie* fraudulent as to the creditors of the defendant, though not so fatally defective as to be void.⁹⁰ On the other hand, a statement, in effect, that the defendant had purchased of the plaintiff a certain indebtedness (describing it), due to the plaintiff, for which he had given to the plaintiff the promissory notes (describing them) upon which and for the amount of which he confessed the judgment, is a sufficient statement.⁹¹ So the statement is sufficient if it sets forth that the judgment is confessed to secure the plaintiff for a debt justly to become due upon his indorsement, as the surety of the defendant and for his benefit, of bills and notes which are fully described as to names, dates, amounts, and times of payment.⁹²

§ 64. Signature to Statement.

The statutes require the statement of indebtedness and confession of judgment to be "made and signed by the defendant." This is construed to mean a signature by the debtor in person. A signature by the defendant's attorney in the case is not sufficient. And where a judgment was entered upon a statement signed by two of the defendants in person and by the attorney of the third, it was held that the consent of those signing was only that judgment might be entered against all; and as there was no authority to enter judgment as to the third party, the judgment was unauthorized and void as to all.⁹³ In another case, where the defendant had signed the verification, but not the statement, which was written upon the same page, this

⁸⁷ *Stern v. Mayer*, 19 Mo. App. 511.

⁸⁸ *Cordier v. Schloss*, 18 Cal. 576.

⁸⁹ *Norris v. Denton*, 30 Barb. 117.

⁹⁰ *Pond v. Davenport*, 44 Cal. 481.

⁹¹ *Kirby v. Fitzgerald*, 31 N. Y. 417.

⁹² *Dow v. Platner*, 16 N. Y. 562.

⁹³ *French v. Edwards*, 5 Sawyer, 266.

was considered sufficient, as being a substantial compliance with the law.⁸⁴

§ 65. Verification of Statement.

The requirement of the statute, that the statement of facts accompanying a judgment by confession be properly verified by the oath of the party, intends that in so far as it relates to things within his own knowledge, he should affirm it to be *true* in unequivocal terms. In regard to other matters he may disclose his information and add a declaration of his belief in its truth. But where the party merely swears that he "believes the above statement of confession is true," the affidavit is insufficient, and the judgment, if entered thereon, will be vacated.⁸⁵ The jurat of the notary should also be in due form; but a formal defect in the jurat will not so far invalidate the judgment as to lay it open to collateral attack.⁸⁶ The verification of the statement, if faulty but not wholly void, is susceptible of amendment.⁸⁷

§ 66. Amendment of Statement.

A motion by plaintiff to amend the statement of a confession of judgment is addressed to the discretion of the trial court. It is not an amendment which he has a legal right to demand, but is one which the court may in its discretion refuse or grant upon such terms as to it may seem to be just.⁸⁸

§ 67. Judgment voidable for Failure to comply with Statute.

A judgment upon confession, though it does not conform exactly to the statutory requirements, is at most voidable, and not absolutely void as against creditors.⁸⁹ Thus, if it fails to set out all the facts

⁸⁴ Purdy v. Upton, 10 How. Pr. 494.

⁸⁵ Ingram v. Robbins, 38 N. Y. 409.
88 Am. Dec. 393.

⁸⁶ Grattan v. Matteson, 54 Iowa, 229,
6 N. W. Rep. 298.

⁸⁷ Cook v. Whipple, 55 N. Y. 150, 14
Am. Rep. 202.

⁸⁸ Symson v. Selheimer, 105 N. Y. 660,
12 N. E. Rep. 81.

⁸⁹ Sheldon v. Stryker, 84 Barb. 116.
But in Edgar v. Greer, 10 Iowa, 279, it
is said that a judgment confessed under
a power which does not conform to
the statute requirements is a nullity.

required by the statute, it is for that reason irregular and *prima facie* fraudulent, but it is not a nullity; the presumption of fraud may be rebutted by proof that the judgment was fair and for a *bona fide* debt.¹⁰⁰ It has also been held that such a judgment is not void because it does not appear that an affidavit, as required by the statute, had been made.¹⁰¹ But the true rule appears to be, that if there has been an attempt to fulfil all the requirements of the law, the judgment is at most only voidable, although the execution of such attempt be informal or defective; but, on the other hand, the total omission of any of the steps prescribed by the statute (as where no statement at all is filed) will render the judgment entirely inoperative and void.¹⁰²

§ 68. Valid between Parties.

A judgment upon confession, founded on a statement of facts which is defective or insufficient to answer the requirements of the statute, will nevertheless be valid and effectual *as between the parties* to it, though voidable at the instance of other creditors.¹⁰³ The judgment-debtor himself cannot avoid it, nor can one do so who claims rights of property under him, but whose interests are not prejudiced thereby.¹⁰⁴ And such a judgment, upon proof of its honesty and good faith,

¹⁰⁰ *Richards v. McMillan*, 6 Cal. 419, 65 Am. Dec. 521.

¹⁰¹ *Dean v. Thatcher*, 32 N. J. Law, 470.

¹⁰² *Bacon v. Raybould* (Utah), 10 Pac. Rep. 481. Boreman, J., observed: "The authorities go to the extent of holding that where there is an incomplete or insufficient statement of such facts [the facts out of which the indebtedness arose], the failure to make a complete statement will be only *prima facie* evidence of fraud as to creditors, and that it cannot be attacked collaterally. But no case has been called to our attention where a court has held that a confession of judgment is merely *prima facie* fraudulent as to creditors, and not liable to be attacked collaterally, where there

was a total absence of the statement of any facts whatever. We know of no instance in which such a case has reached an appellate court. The statement of such facts is a prerequisite to the confession of judgment—it is not a confession of judgment without it."

¹⁰³ *Coolbaugh v. Roemer*, 80 Minn. 424, 15 N. W. Rep. 869; *Miller v. Earle*, 24 N. Y. 110; *Neusbaum v. Keim*, 24 N. Y. 325; *Kirby v. Fitzgerald*, 31 N. Y. 417; *Bryan v. Miller*, 28 Mo. 32, 75 Am. Dec. 107; *How. v. Dorscheimer*, 31 Mo. 349; *Lee v. Figg*, 37 Cal. 323, 99 Am. Dec. 271; *Pond v. Davenport*, 44 Cal. 481; *Plummer v. Douglas*, 14 Iowa, 69, 81 Am. Dec. 456. See also *Shadrack v. Woolfolk*, 32 Gratt. 707.

¹⁰⁴ *Coolbaugh v. Roemer*, 80 Minn. 424, 15 N. W. Rep. 869.

authorizes the creditor to impeach a fraudulent transfer made by the debtor, for the purpose of making the lien of the judgment effectual.¹⁰⁵ Where the property of the defendant has been sold under an execution upon a judgment confessed without a sufficient statement, the purchaser's title cannot be impeached by a creditor having no judgment or lien on the property at the time of the levy.¹⁰⁶ At the same time, if another creditor attacks a confessed judgment founded upon a defective or insufficient statement, it devolves upon the plaintiff therein to negative the idea of fraud or collusion, and to show that the judgment is warranted by facts actually existing, although such facts were not included in the statement.¹⁰⁷ The same rule holds true of a judgment confessed without the affidavit to the justness of the debt required by statute; it is valid between the parties, though void or voidable as to other creditors.¹⁰⁸

§ 69. For what Judgment may be confessed.

The statutes commonly provide that the debtor confessing judgment shall make oath that the debt is "justly due or to become due." It follows of course that if the judgment is for a purely fictitious debt, or is in excess of the real debt so far as to interfere with the rights of other creditors, it is fraudulent and cannot stand. Thus, where a judgment is confessed and execution levied for such an amount that subsequent judgment creditors find nothing to levy on, a combination between the parties having been proved, fraud will be established.¹⁰⁹ It is also essential that the debt be a *legal* debt,—that is, one which would not be rejected by a court on account of its illegal consideration. Yet it appears that the defendant in the judgment and those claiming under him (for instance, a subsequent mortgagee of his land) are estopped from denying the validity of

¹⁰⁵ *Neusbaum v. Keim*, 24 N. Y. 325.

¹⁰⁶ *Miller v. Earle*, 24 N. Y. 110.

¹⁰⁷ *Cordier v. Schloss*, 18 Cal. 576. See *Bacon v. Raybould*, 10 Pac. Rep. 481; *Richards v. McMillan*, 6 Cal. 419, 65 Am. Dec. 521.

¹⁰⁸ *Marity v. Eastridge*, 67 Ind. 211;

Chapin v. McLaren, 105 Ind. 563, 5 N. E. Rep. 688; *Caley v. Morgan*, 114 Ind. 350, 16 N. E. Rep. 790; *Gardner v. Bunn* (Ill.) 21 N. E. Rep. 614; *Stone v. Williams*, 40 Barb. 322.

¹⁰⁹ *Nusbaum v. Louchheim* (Pa.) 1 Atl. Rep. 391.

the judgment, although the demand might not have been recoverable at law.¹¹⁰ The word "due," as used in these statutes, must not be taken in too narrow a sense. It does not necessarily import a debt which might be recovered in an action at law against any defenses which the debtor might set up. There are certain defenses which the debtor has the option of waiving if he chooses, and he does waive them by confessing judgment. For example, such a judgment is not invalidated by the fact that a part of the claim for which it is given would be barred by the statute of limitations, provided the debt be an honest one.¹¹¹ So where a bankrupt, subsequent to his discharge, confesses judgment upon an old debt, the debt is a good consideration for the judgment, and the latter is not affected by the discharge.¹¹² It is further necessary that a confession of judgment be for a certain and specific sum. A judgment entered by a justice, on the confession of a defendant, for such sum as A. and B. shall award, before the award is declared, is invalid.¹¹³ Where several powers of attorney are given to confess judgment on several debts in favor of and against the same parties, it is proper and competent for the court to consolidate them and enter but one judgment.¹¹⁴ A judgment cannot be confessed for a claim arising *ex delicto*. A statute which allows confession of judgment "for money due or to become due" should not be construed as authorizing the confession of a judgment for damages growing out of a tort.¹¹⁵

§ 70. Debt not yet due.

Where the language of the statute is that judgment may be confessed for a debt "justly due and owing," it applies only to a debt payable at the time of the confession, for these terms import an immediate liability. But where it authorizes a confession "for money

¹¹⁰ *Shufelt v. Shufelt*, 9 Paige, 187, 37 Am. Dec. 381.

¹¹¹ *Keen v. Kleckner*, 42 Pa. St. 529.

¹¹² *Dewey v. Moyer*, 72 N. Y. 70.

¹¹³ *Nichols v. Hewit*, 4 Johns. 423. But a power of attorney to confess judgment "for an amount that may be

found due" on the note therein described, and sufficient to give the court jurisdiction, is adequate. *Patterson v. State*, 2 Greene (Iowa), 492.

¹¹⁴ *Genestelle v. Waugh*, 11 Mo. 367.

¹¹⁵ *Burkham v. Van Saun*, 14 Abb. Pr. N. S. 163; *Boutel v. Owens*, 2 Sandf. 655.

due or to become due," this may well include a claim founded upon an obligation now existing but not yet demandable. Thus the fact that a note upon which a confession of judgment was taken was not due when the judgment was rendered does not deprive the court of jurisdiction, and the judgment will not be vacated on that account.¹¹⁶ "The fact that a note may not be due at the time of a confession upon it, might be a suspicious circumstance in a contest with other creditors of the debtor, but it would not render the judgment void in the proper sense of that term."¹¹⁷ So a judgment is not void as to creditors because the action is commenced before the maturity of the note which was the cause of action, and the defendant confesses judgment without service of process.¹¹⁸ Authority may be given by a warrant of attorney to confess judgment for a debt not yet due, but it must be given in clear and precise terms. Thus where the warrant, attached to a promissory note given in extension of others, authorized the attorney to appear for the maker at any time thereafter and confess judgment "for such amount as may appear to be unpaid thereon," it was held that the authority given was to confess judgment only for the amount actually due, not that accruing.¹¹⁹ When a warrant of attorney confers authority, in a certain contingency, to confess judgment on a note before it is due, the record must show that the specified contingency had happened, otherwise the judgment is unwarranted.¹²⁰

§ 71. For Future Advances.

A judgment by confession may be taken to secure future advances of notes or other commercial paper to be made by the creditor to the debtor;¹²¹ or to secure both existing and future indorsements for his accommodation.¹²² "A judgment or other security may be taken and held for future responsibilities and advances, to the extent of the

¹¹⁶ *Black v. Pattison*, 61 Miss. 599; *Mechanics' Bank v. Mayer*, 93 Mo. 417, 6 S. W. Rep. 287; *McClish v. Manning*, 8 Iowa, 228.

¹¹⁷ *Calloway v. Byram*, 95 Ind. 423.

¹¹⁸ *Pond v. Davenport*, 45 Cal. 225.

¹¹⁹ *Reid v. Southworth*, 71 Wis. 288, 36

N. W. Rep. 866. And see *Smith v. Pringle*, 100 Pa. St. 275.

¹²⁰ *Roundy v. Hunt*, 24 Ill. 598.

¹²¹ *Cook v. Whipple*, 55 N. Y. 150, 14 Am. Rep. 202.

¹²² *Lansing v. Woodworth*, 1 Sandf. Ch. 43.

amount of the judgment or security. But to enable a creditor to hold a judgment or other security for future responsibilities and advances, it must be a part of the original agreement that the judgment, or security, should be a security for such responsibilities and advances. It cannot, as against third persons, be held to meet and cover new and distinct engagements subsequently entered into by the parties."¹²² And it seems that advances made or responsibilities incurred, after a subsequent judgment has intervened, will not be covered by the confessed judgment.¹²⁴

§ 72. For contingent Liabilities.

In those jurisdictions where the more liberal statute is in force, a judgment may be confessed to secure a future or contingent liability. Thus a judgment confessed as an indemnity for liabilities incurred by another is good at law against subsequent judgments, and may be enforced before the party assuming the liabilities has discharged them.¹²⁵ A judgment on confession may be enforced by execution, and is sustained by the same presumptions as other judgments, notwithstanding it was recovered on a contingent liability.¹²⁶ In those states, however, where a judgment can only be confessed for a debt that is "due and owing," the rule is different in this respect. Thus, in a New Jersey case the learned vice-chancellor said: "I think I am bound to consider the doctrine as settled, so far at least as this court is concerned, that a judgment on bond and warrant of attorney, under our statute, can only be entered for a debt actually existing at the time of its entry, and that a simple liability as indorser or surety does not constitute such a debt."¹²⁷

¹²² *Averill v. Loucks*, 6 Barb. 19; *Truscott v. King*, 6 Barb. 246. See *Frye v. Jones*, 78 Ill. 637.

¹²⁴ *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320.

¹²⁵ *Ford v. Elkin*, 2 Speers. 146. And see *Ely v. Parkhurst*, 25 N. J. Law, 183.

¹²⁶ *Allen v. Norton*, 6 Oreg. 844. A confession is valid though the judgment is not to be entered up except upon the happening of a contingency. *Keep v. Leckie*, 8 Rich. 164.

¹²⁷ *Sayre v. Hewes*, 33 N. J. Eq. 652. See *Clapp v. Ely*, 10 N. J. Eq. 178.

§ 73. Amount of the Judgment.

Where a judgment is entered on a warrant of attorney and includes a greater sum than was actually confessed, it is held to be void only as to the excess, not *in toto*, unless the excess was fraudulently included.¹²⁸ Upon a confession of judgment in a pending action, if the plaintiff's demand is in the nature of a debt which may be ascertained by calculation, it is sufficient to enter judgment generally. The judgment is supposed to be for the amount of damages laid in the declaration and execution may issue accordingly. But if the plaintiff should indorse upon the declaration the actual amount of the debt, and if the defendant complains that injustice has been done, the court on motion, upon a proper case being made out, will grant immediate relief.¹²⁹ Where the confession of judgment does not determine the extent of the recovery, and it is not ascertainable by mere calculation, it must be liquidated by the court and not by the clerk.¹³⁰

§ 74. Liquidation of Amount by Clerk.

In the case of a confession of judgment without action, the statutes sometimes authorize the prothonotary or clerk of the court to enter up judgment on a warrant, without the actual intervention of an attorney appearing for the defendant. But such a statute, it is held, does not give him all the powers of an attorney. He can enter judgment only when the amount due appears on the face of the instrument, or is ascertainable by calculation from its face.¹³¹ Thus where judgment was confessed for the value of certain land at the rate of \$10 per acre, the quantity to be ascertained by survey, it was

¹²⁸ *Davenport v. Wright*, 51 Pa. St. 292. But where there was a power of attorney to confess judgment on a note for \$26,000, the note was described in the declaration, which claimed \$50,000 damages, and the plea of confession admitted an indebtedness and confessed judgment for the latter sum, and the clerk rendered judgment for \$26,000; *held* that the attorney confess-

ing the judgment exceeded his power, that the clerk did not have power to deviate from the plea of confession, and the judgment was void. *Tucker v. Gill*, 61 Ill. 236.

¹²⁹ *Lewis v. Smith*, 2 Serg. & R. 142.

¹³⁰ *Bonta v. Clay*, 1 Litt. 27.

¹³¹ *Hope v. Everhart*, 70 Pa. St. 281; *Connay v. Halstead*, 78 Pa. St. 354.

held that the prothonotary had no power to enter a judgment.¹²² Such a power must also be exercised by the officer without unnecessary delay. Where a judgment was confessed "amount to be ascertained by the prothonotary," and no amount was ascertained for fourteen years, and the plaintiff and principal defendant were dead, the court refused to make an order for ascertaining the amount against the surety.¹²³

§ 75. Inclusion of Attorney's Fees.

A judgment entered by confession upon a warrant of attorney may include fees to the attorney appearing in the case (nominally for the debtor, really in behalf of the creditor), if that be authorized by the power.¹²⁴ And it is altogether usual to incorporate a stipulation for such fees in the warrant. Such a provision rests upon a valid consideration and is not fraudulent as to other creditors;¹²⁵ unless the amount designated as attorney's fees is grossly in excess of any reasonable amount, in which case the judgment, at least to the extent of such fees, is fraudulent and void as against the other creditors of the defendant.¹²⁶ And the attorney's commissions authorized in a judgment-note cannot be collected as part of the debt due when the debtor was ready to pay at the maturity of the note.¹²⁷ It is customary to specify in the warrant or note the sum which may be incorporated in the judgment as a fee for the attorney. But cases have sometimes come before the courts in which the provision, instead of being explicit, merely designated a "reasonable attorney's fee." This language, it is held, gives to the court in which the confession is made the right to determine what is a reasonable fee; it does not leave it to the option or the conscience of the attorney; it contemplates a judicial proceeding by the court for the purpose of ascertaining the amount which may reasonably be charged up. Hence if the attorney himself fixes the sum of his fees, under a power so

¹²² Connay v. Halstead, 73 Pa. St. 354.

¹²³ Cook v. Cooper, 4 Harringt. 189.

¹²⁴ Ball v. Miller, 88 Ill. 110.

¹²⁵ Weigley v. Matson, 125 Ill. 64, 16 N. E. Rep. 831.

¹²⁶ Hulse v. Mershon (Ill.), 17 N. E. Rep. 50.

¹²⁷ Moore v. Kilgore, 110 Pa. St. 433, 1 Atl. Rep. 593.

worded, and confesses judgment for the whole, he acts in excess of his authority, and the judgment so entered, without the intervention of the court, is void.¹³⁸

§ 76. Recording the Judgment.

Under a statute relating to judgments by confession, which requires the plaintiff to file a sworn statement, and enacts that the clerk shall indorse the judgment upon the statement and enter it in the judgment-book, the two entries should be deemed to have the force of duplicate copies, each having the effect of an original.¹³⁹ The power of attorney confessing the judgment should be filed as a part of the record.¹⁴⁰

§ 77. Reversing and Vacating Judgments by Confession.

In what circumstances a judgment entered upon the confession of the defendant may be reviewed in the appellate court, or opened or vacated in the court below, at the defendant's own instance, is a question involved in much doubt. The difficulty arises from the fact that the debtor, by his voluntary action in the matter, must be considered to have waived his strict technical rights to some extent, and yet he should be protected from injustice and from errors sufficient to vitiate the whole proceeding. In the first place, it is held in several states that a confession of judgment operates as a release of all errors in the record, and consequently it cannot be carried to the appellate court either by appeal or *certiorari*.¹⁴¹ On the other hand, it is elsewhere held that a confession of judgment, although a waiver of formal errors, does not prevent the defendant from procuring the reversal of the judgment for errors of substance.¹⁴² In regard to the

¹³⁸ *Campbell v. Goddard*, 128 Ill. 230, 14 N. E. Rep. 261; *S. C.* 117 Ill. 251, 7 N. E. Rep. 640.

¹³⁹ *King v. Higgins*, 3 Oreg. 406.

¹⁴⁰ *Durham v. Brown*, 24 Ill. 98.

¹⁴¹ *Garner v. Burleson*, 26 Tex. 348; *Mandeville v. Holey*, 1 Pet. 186; *Wilson*

v. Collins, 9 Ala. 127. See *De Riemer v. Cantillon*, 4 Johns. Ch. 85.

¹⁴² *Battelle v. Bridgman*, 1 Morris (Iowa), 363; *Portage Canal Co. v. Crittenden*, 17 Ohio, 436. See *Montgomery v. Barnett*, 8 Tex. 143; *Kennedy v. Lowe*, 9 Iowa, 580; *Hopkins v. Howard*, 13 Tex. 7.

jurisdiction of the court below, it seems to be conceded that it has power to give equitable relief in cases calling for its interposition.¹⁴⁵ "The power of the courts to open judgments entered by confession, or in default of an appearance or plea, is not denied; and it is the duty of the courts to exercise such power wherever it is satisfactorily shown that in equity the judgment ought not to be collected."¹⁴⁶ In order to prevent any question of this kind, the parties sometimes incorporate a release of errors in the confession or warrant of attorney, the effect being, of course, to waive any formal objections or irregularities. But where this is not done, it is proper to examine with care any irregularity in the proceeding, and to vacate the judgment if substantial injustice may have been done to the defendant.¹⁴⁶ The opening of such a judgment is therefore a matter of sound discretion, and whether such a sound discretion has been exercised by the court below depends upon the whole evidence, in which the burden of proof is to show a defense.¹⁴⁶ The judgment should not be opened and the defendant let in to defend, except upon evidence of such weight and clearness as would be sufficient to warrant a chancellor in decreeing that the instrument upon which the confession was founded was void, or should be reformed for fraud or mistake.¹⁴⁷ Whether a judgment against two persons, entered by confession on a warrant of attorney, may be set aside as to one of them and stand good as to the other, is an unsettled point. It depends upon whether, in the particular state, a joint judgment is considered as an entirety or as severable.¹⁴⁸ When the application to set aside the judgment proceeds from another creditor of the defendant, there is less doubt as to the power of the court. It may clearly vacate the judgment for fraud or collusion between the

¹⁴⁵ *McAllister's Appeal*, 59 Pa. St. 204. Before vacating a judgment entered by confession upon a warrant of attorney, in a doubtful case, the defendant will be let in to defend, courts of law having an equitable jurisdiction in this regard. *Walker v. Ensign*, 1 Ill. App. 118.

¹⁴⁶ *Earnest v. Hoskins*, 100 Pa. St. 551.

¹⁴⁶ *McCabe v. Sumner*, 40 Wis. 886.

¹⁴⁶ *Roenigh's Appeal* (Pa.), 3 Atl. Rep. 99.

¹⁴⁷ *English's Appeal*, 119 Pa. St. 533, 18 Atl. Rep. 479.

¹⁴⁸ See *Silvers v. Reynolds*, 2 Harringt. 257; *York Bank's Appeal*, 36 Pa. St. 458; *North v. Mudge*, 18 Iowa, 496, 81 Am. Dec. 441; *Chapin v. Thompson*, 20 Cal. 631. See *supra* §§ 58, 64.

parties, or for a substantial failure to comply with the statutory requirements.¹⁴⁹

§ 78. Effects of Confessed Judgment.

"In contemplation of law, a judgment on a warrant of attorney is as much an act of the court as if it were formally pronounced on *nil dicit* or a *cognovit*, and till it is reversed or set aside, it has all the qualities and effects of a judgment on a verdict."¹⁵⁰ A judgment upon confession is therefore just as conclusive, between the parties and their privies, of the facts and points necessarily involved in and determined by it, and as final a bar to the maintenance by the creditor of another suit for the same demand, as any other judgment.¹⁵¹

¹⁴⁹ As, on the ground that the statement of indebtedness was insufficient. *Thompson v. Hintgen*, 11 Wis. 112. But a judgment upon confession will not be vacated because the affidavit of plaintiff's agent, on which it was entered, fails to state his means of knowledge, unless the judgment is inequitable; for this is a mere irregularity. *Pirie v. Hughes*, 48 Wis. 531.

¹⁵⁰ *Braddee v. Brownfield*, 4 Watts, 474. A judgment confessed upon terms, duly entered, is in effect a conditional judgment, and the court will take no-

tice of the terms and enforce them. *Wood v. Bagley*, 12 Ired. 83.

¹⁵¹ *Braddee v. Brownfield*, 4 Watts, 474; *Sheldon v. Stryker*, 84 Barb. 116; *Neusbaum v. Keim*, 24 N. Y. 325; *Dean v. Thatcher*, 3 Vroom, 470; *North v. Mudge*, 18 Iowa, 496, 81 Am. Dec. 441; *Twogood v. Pence*, 23 Iowa, 543; *Sherman v. Christy*, 17 Iowa, 323; *Secrist v. Zimmerman*, 55 Pa. St. 446; *Kirby v. Fitzgerald*, 81 N. Y. 417; *Weikel v. Long*, 55 Pa. St. 288; *Goff v. Dabbs*, 4 Baxt. 300.

CHAPTER IV.

JUDGMENTS BY DEFAULT.

- § 79. Judgment of *Nil Dicit*.
- 80. Judgment by Default.
- 81. Against Whom may be taken.
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- 89. Interlocutory Judgment, when necessary.
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- 94. Opening and Vacating Judgments by Default.
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§ 79. Judgment of *Nil Dicit*.

When a defendant puts himself in default by failing to plead or file an answer within a time prescribed, although he may have entered an appearance in the action, the judgment given against him is technically called judgment of *nil dicit*, that is, that he "says nothing" in opposition to the plaintiff's claim, and therefore the latter is entitled to recover.¹ But if the defendant has put in his plea, and issue has been joined, and he then fails to appear when the case is called for trial, this species of judgment cannot properly be entered, for he is not in default for want of an answer.² However, the distinction between this judgment and the other varieties of judgment against the defendant for failure to take a required step in the action is no longer strictly observed, and when the judgment is *nil dicit* when it should

¹Stewart v. Goode, 29 Ala. 476; Sum-
merlin v. Dowdle, 24 Ala. 428. See *su-*
pra, § 15.

²Taylor v. McLaughlin, 2 Colo. Ter.
875.

have been by default, it is merely informal and will not be reversed on that account.³ But in Texas it is said that while the proceeding to ascertain the amount of damages is the same on judgments by *nil dicit* as on judgments by default, "in other respects, a judgment by *nil dicit* is held by this court to possess a stronger implication in favor of the plaintiff's claim than an ordinary judgment by default; it is regarded as partaking of the nature of a judgment by confession as well as by default."⁴ The distinction, however, is not of practical value, nor is it generally recognized.

§ 80. Judgment by Default.

Properly speaking, a judgment by default is one taken against a defendant when, having been duly summoned or cited in an action, he fails to enter an appearance. But the term is frequently (and indeed commonly) used in a much wider sense, in which it includes judgments given against the defendant for want of a plea, answer, affidavit of defense, etc., as well as for want of an appearance. The latter is the signification of the word as used in this chapter. The characteristic feature of a judgment by default is that it follows upon the negligence or omission of the defendant, passing over the steps that would otherwise be taken, trial and verdict, and adjudging against him immediately upon his failure to defend.⁵ In respect to its effects and consequences,—as the foundation of a suit, as a lien, as a bar or estoppel,—a judgment by default does not differ from one rendered upon a verdict. There are, however, certain distinctive rules, particularly in reference to its rendition and entry, which require separate treatment and which will form the subject-matter of the following pages. The rendition of a judgment by default, it is held, is no violation or abridgement of the constitutional right of trial by jury.⁶

³ Shields v. Barden, 6 Ark. 459.

⁴ Storey v. Nichols, 22 Tex. 87.

⁵ A judgment rendered by a justice of the peace when the defendant is present by attorney, who, however, takes no part in the trial, is not a judgment "by default." Borgwald v. Fleming, 69 Mo. 212.

⁶ Cureton v. Stokes, 23 S. Car. 583; Lawrence v. Borm, 86 Pa. St. 226; Randall v. Weld, 86 Pa. St. 357; Hunt v. Lucas, 99 Mass. 409; Dartie v. Lockwood, 61 Ga. 298. The right of trial by jury is not impaired by a law giving to the court the right to assess damages without a jury in case of default. Hopkins

The right is one which (at least in a civil action) may be waived by the party, and the defendant cannot claim that the privilege is denied to him if he presents no defense to be tried by a jury.

§ 81. Against Whom may be taken.

As a general rule, a default may be taken against any natural person against whom the same judgment might have passed as the result of contested proceedings. But there are certain exceptions to this statement. Thus, in California, a person summoned as a garnishee may be punished for contempt for disobeying an order whereby he is required to disclose his indebtedness if any, but a judgment by default cannot be taken against him, and such judgment is without jurisdiction and void.⁷ In some other states, however, where the court has regularly obtained jurisdiction of the garnishee and there is no answer on his part, it is held that a judgment by default may be entered against him, and such judgment will be sufficient to protect the garnishee if no defense on the merits could have been made.⁸ Judgments by default may be entered against non-residents and against persons under disabilities; but the *validity* of such judgments must be tested by rules which belong to later sections of this book.⁹ A default judgment may also be rendered against a corporation; but in order to support it, it must appear of record that the person who, as shown by the return of the officer, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation.¹⁰

§ 82. Joint Defendants.

The rule of the common law, in regard to actions in which several persons were joined as defendants, was that judgment must be given

v. Ladd, 85 Ill. 178; Seeley v. Bridgeport, 53 Conn. 1; Raymond v. Railroad, 43 Conn. 596.

⁷ Hibernia Savings Society v. Superior Court, 56 Cal. 265.

⁸ Scamahorn v. Scott, 42 Iowa, 520;

Abell v. Simon, 49 Md. 818; Gracy v. Coates, 2 McCord, 224; Jones v. Tracey, 75 Pa. St. 417; Laughlin v. January, 59 Mo. 388.

⁹ See *infra*, §§ 227-232; 190, 196.

¹⁰ Cloud v. Pierce City, 86 Mo. 357.

against all or none of them. The plaintiff could not recover against a part of the defendants and be defeated of his claim against the rest, except in the single case where one of them set up and succeeded in establishing a defense entirely personal to himself, as his release or discharge or his personal disability to contract. Consequently, except in so far as the rule is changed by statute, where several persons are summoned as defendants, and one of them pleads and the other suffers a default, final judgment cannot be entered upon the default until the issue as to the other defendant is disposed of, and not even then unless the plaintiff had a verdict on the issue or the defendant pleading had set up a merely personal defense.¹¹ But this has been changed, in several of the states, by the statutes, which provide that in actions regularly commenced against several joint defendants the court may, in its discretion, and whenever a several judgment would be proper, render judgment against one or more of them, leaving the action to proceed against the others. Under a law of this character, it would be proper to render a judgment by default against the defendant not pleading, where the cause of action was joint and several. But if the claim were upon a joint contract, such a judgment would necessarily remain interlocutory until the issues raised were finally disposed of, for in that case the defendants must stand or fall together. We shall recur to this subject at a later point.¹² It is also held that where process is served on only one of two defendants, judgment cannot be rendered against both by default.¹³ But it seems to be otherwise under the "joint debtor acts," existing in several of the states, in actions upon a joint contract.¹⁴

¹¹ Russell v. Hogan, 1 Scam. 552; Catlin v. Latson, 4 Abb. Pr. 248; Taylor v. Beck, 8 Rand. 816; Woodward v. Newhall, 1 Pick. 500; Hutchings v. Bank, 4 Ark. 517. See Curry v. Roundtree, 51 Cal. 184. If three defendants demur, and, after the demurrer is withdrawn, two of them plead, a judgment *nisi* *dicti* should be entered against the party not pleading, and the jury should as-

sess the damages against all. If but two plead and the other abide by his demurrer, he cannot be regarded as going to trial with the others. Freeland v. Supervisors, 27 Ill. 308.

¹² See *infra* §§ 206, 209.

¹³ Rider v. Alleyne, 2 Scam. 474; Winlow v. Lambard, 57 Me. 356.

¹⁴ See *infra* §§ 235, 236.

§ 83. Jurisdiction of the Defendant.

In order to the validity of a judgment by default, as in the case of any other judgment, it is essential that the court should have acquired jurisdiction of the person of the defendant.¹⁶ A judgment entered by default against a party who has not been served with process and who has not appeared in the action, is irregular and void.¹⁶ And due and proper service must appear upon the record before the court is authorized to render a judgment by default;¹⁷ though here it is necessary to recollect the presumptions of jurisdiction by which any judgment of a superior court is sustained when assailed collaterally or made the basis of a new suit. It being necessary, therefore, that the court should have jurisdiction in the case, it is evident that a defect or failure in this respect may arise either from some peculiarity in the process itself or from the manner of its service. Now, to be duly served with a summons is said to imply that the defendant has been duly served with a summons notifying him to appear and answer in the court where the judgment is sought to be taken.¹⁸ Assuming these to be the essentials of a proper notice, it follows that the writ, although properly *served*, may be so defective in itself as to confer no jurisdiction over the defendant. Such would be the case if it omitted to apprise him of the court in which the action had been commenced or the day on which he was required to appear.¹⁹ It is not true, however, that any irregularities in the process, short of this, may be entirely disregarded. The rule is, that if the notice is defective or irregular, but not to the extent of being substantially worthless, a judgment by default entered thereon will be irregular and lia-

¹⁶ On the general subject of jurisdiction as essential to the validity of a judgment, see *infra* §§ 215-244.

¹⁷ *Moore v. Watkins*, 1 Ark. 268; *Townsend v. Townsend*, 21 Ill. 540; *Johnson v. Delbridge*, 35 Mich. 486; *Duncan v. Gerdine*, 59 Miss. 550; *Prentiss v. Mellen*, 1 Sm. & Mar. 521; *Stallings v. Gully*, 8 Jones (N. Car.) 344; *Winalow v. Anderson*, 8 Dev. & B. 9, 83

Am. Dec. 651; *Graham v. Graham*, 4 Munf. 205; *Warren Manuf. Co. v. Aetna Ins. Co.*, 2 Paine, 501; *Bascom v. Young*, 7 Mo. 1; *State v. Weber*, 28 La. Ann. 798.

¹⁷ *Wilkinson v. Bayley*, 71 Wis. 131, 36 N. W. Rep. 836.

¹⁸ *Smith v. Ellendale Co.*, 4 Oreg. 70.

¹⁹ *Kitsmiller v. Kitchen*, 24 Iowa, 163.

ble to be corrected or set aside on motion, or reversed above, but not absolutely *void*, and hence not open to collateral attack.²⁰ In the next place, the process, sufficient in itself, must be duly served upon the party. But here also slight irregularities, not fatal in themselves, will not have the effect of depriving the court of jurisdiction. "If the court to which the process is returnable adjudges the service to be sufficient and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal."²¹ A voluntary *appearance* by the defendant will of course be sufficient to confer jurisdiction, and will amount to a waiver of formal and technical defects in the process or its service. But a default obtained without proper service and on an unauthorized appearance, is an absolute nullity.²² The defendant may also acknowledge service of the writ, and thereby forego his objections to the manner of service or the person executing it. But it is held in some states that an indorsement upon the process, of a written acknowledgment of service, purporting to be signed by the party, is not sufficient, without proof of the authenticity of such indorsement and signature, to authorize the entry of default for want of an appearance.²³ This rule, however, is probably too severe to find general acceptance. On similar principles, in a state where the law is that a judgment by default cannot be entered except upon proof of the *personal* service of the summons and complaint, an admission of "service," not stating the mode in which the service was made, is not sufficient.²⁴ To warrant entering a judgment against one who has been made a defendant upon his own motion, there must be notice and proof of no answer, the same as in

²⁰ De Tar v. Boone Co., 34 Iowa, 488; Betts v. Baxter, 58 Miss. 384; Christian v. O'Neal, 46 Miss. 669; Campbell v. Hays, 41 Miss. 561; Isaacs v. Price, 2 Dill. 351.

²¹ Isaacs v. Price, 2 Dill. 351.

²² Great West Min. Co. v. Woodmas Min. Co., (Colo.) 20 Pac. Rep. 771. An affidavit for continuance filed by defendant is not such an appearance as will warrant judgment by default. Hoyt v. Macon, 2 Col. Ter. 118. Nor

is service of notice of a motion to dissolve an attachment on account of irregularity, made by defendant's attorney. Glidden v. Packard, 28 Cal. 649.

²³ Johnson v. Delbridge, 35 Mich. 436; Davis v. Jordan, 5 How. (Miss.) 295. Where a judgment by default recited that service of the writ in the case was acknowledged by the defendant, *held*, sufficient to sustain the judgment. Winston v. Miller, 20 Miss. 550.

²⁴ Read v. French, 28 N. Y. 285.

the ordinary case of a defendant who has been served and has appeared.²⁵ In fact, the cardinal principle is that a defendant cannot be put in default without due notice of everything which requires him to take affirmative action. Thus in a case where judgment by default was rendered on a substituted petition, the substitution having been made without notice to the defendant or any one authorized to represent him, the judgment was held to be erroneous.²⁶

Thus far we have not spoken of judgments by default rendered upon constructive service of process. This proceeding is authorized by statute in many of the states, in actions against non-resident defendants, and cases involving the validity of such judgments are by no means infrequent. The subject properly belongs to another part of this work, and in this connection it is only necessary to remark that the statutes authorizing the entry of such judgments are strictly construed and the prescribed procedure must be strictly followed, and that such judgments have no extraterritorial validity and are not binding on the defendant out of the state where rendered, except in actions *in rem* and *quasi in rem* (as in divorce), and in cases where the jurisdiction is based on attachment of the defendant's property found within the state, in which latter instance the judgment is universally valid in so far as it affects to dispose of such property.²⁷

§ 84. Must be founded on good Declaration.

A judgment entered by default will be irregular and erroneous unless it rests upon a good and sufficient declaration or complaint duly filed in the action.²⁸ Hence if the plaintiff's pleading sets out no cause of action, a judgment by default thereon cannot stand.²⁹ "A default is an admission of the cause of action stated in the petition, and that something is due to the plaintiff. But where no cause of action is

²⁵ Fagan v. Barnes, 14 Fla. 53.

²⁶ Watson v. Miller, 69 Tex. 175, 5 S. W. Rep. 680.

²⁷ See *infra* §§ 227-232.

²⁸ Amason v. Nash, 19 Ala. 104; Wellborn v. Sheppard, 5 Ala. 674; Merritt v.

White, 37 Miss. 438; Glenn v. Shelburne, 29 Tex. 125.

²⁹ Thighen v. Mundine, 24 Tex. 282; Abbe v. Marr, 14 Cal. 210; Barron v. Frink, 30 Cal. 486; Hallock v. Jaudin, 34 Cal. 167.

stated in the petition a default can have no such effect. It is true that a defendant may be concluded by a default where the facts stated in the petition do not constitute a good cause of action in law, or where the petition is so defective as to be vulnerable to a demurrer. But where the petition omits the necessary averment to show liability against the defendant, the court may and should, even upon default, refuse to enter judgment."³⁰ A view opposite to that here stated has been taken in some of the New York cases,³¹ on the ground that, if the complaint is defective in this particular, the remedy by demurrer is open to the defendant, and if he neglects to avail himself of it, he waives any objections which he might thus present, and cannot ask to have the judgment set aside or reversed. But the very obvious answer to this is, that an objection to the complaint, on the score of its failure to state a cause of action, like an exception to the jurisdiction of the court, is never waived; that a default admits nothing more than the plaintiff has chosen to allege, and the silence of the defendant should not be made to help him out; and that if the plaintiff has not stated a case sufficient to justify the intervention of the law in his behalf, he is not entitled to any judgment, whether the defendant answers or not. A petition, for instance, which does not allege an assignment of the claim sued on, when it is not in the plaintiff's name and no assignment is proved, will not sustain a judgment by default.³² The question is different where the judgment is rendered on a declaration containing both good and bad counts. Here it is said that the insufficiency of one count to sustain a judgment will not impair the plaintiff's right to recover on the other, and hence the judgment will be allowed to rest on the cause of action well pleaded and will not be reversed.³³ There are cases, however, holding that the damages being general, and nothing appearing to show that they were in fact assessed upon the good count only, there is no authority to presume that they were so assessed, and hence (just as in the case of a verdict and gen-

³⁰ *Bosch v. Kassing*, 64 Iowa, 812, 20 N. W. Rep. 454. See *Walker v. Massey*, 10 Ala. 80.

³¹ *Adams v. Oaks*, 20 Johns. 282; *Dorr v. Birge*, 8 Barb. 851; *Pope v. Dinsmore*, 8 Abb. Pr. 429. See also *Frankfurth v.*

Anderson, 61 Wis. 107, 20 N. W. Rep. 662.

³² *Thompson v. Stetson*, 15 Nebr. 112, 17 N. W. Rep. 368.

³³ *Hunt v. San Francisco*, 11 Cal. 350.

eral damages, upon a declaration containing a count bad in substance) the judgment will be erroneous.³⁴

§ 85. Premature Entry of Default.

A judgment rendered by default against a defendant before the expiration of the time allowed to him for filing a plea or answer, is irregular but not absolutely void; and if the defendant takes no steps to correct the error, he is presumed to have waived it.³⁵ That time is given for the benefit of the defendant, and he may waive it and consent that a judgment be entered against him before its expiration.³⁶ So if after due service of summons, judgment by default is entered one day sooner than the statute allows, but the defendant is informed of the date of the entry, both by an attachment served on him shortly thereafter and by a *scire facias*, duly served, to revive the judgment, several years later, but takes no action until after the judgment has been revived, the irregularity will be regarded as waived, and a motion to strike off the judgment will be denied.³⁷ A decree *pro confesso*, signed after the time for answering has expired, is regular, though an order for further time to answer be signed and filed on the same day with the signing of the decree.³⁸ In case of a default, judgment may be entered before the case is reached in its regular order on the docket.³⁹

§ 86. Default when proper.

When an answer or other pleading of a defendant, raising an issue of law or fact, is properly on file in the case, no judgment by default

³⁴ *Hemmenway v. Hickes*, 4 Pick. 496; *Dryden v. Dryden*, 9 Pick. 546.

³⁵ *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. Rep. 71; *Burt v. Scranton*, 1 Cal. 416; *Mitchell v. Aten*, 37 Kans. 33, 14 Pac. Rep. 497; *West v. Williamson*, 1 Swan, 277; *Grover v. Holman*, 3 Heisk. 519. See, as to judgment by default in a justice's court, rendered, in the absence of defendant and his counsel, prior to the hour set out in the citation, *Yentzer v.*

Thayer, 10 Colo. 63, 14 Pac. Rep. 53. And see *Dow v. Murch*, 80 Me. 403, 15 Atl. Rep. 26.

³⁶ *Hoguet v. Wallace*, 28 N. J. Law, 528.

³⁷ *Harper v. Biles*, 115 Pa. St. 504, 3 Atl. Rep. 446.

³⁸ *Emery v. Downing*, 13 N. J. Eq. 59.

³⁹ *Brenner v. Gundershiemer*, 14 Iowa, 82.

can be entered against him; to authorize a default, the answer or other pleading must be disposed of by motion, demurrer, or in some other manner.⁴⁰ The authorities do not go to the extent of holding that such a judgment would be absolutely void, but it would be set aside on motion of the defendant or reversed on appeal. There appears to be some doubt as to whether the plea should be actually *on file*, in order to prevent a default, or whether it is sufficient if duly brought to the notice of the plaintiff or his attorney.⁴¹ The question will be governed to some extent by the local practice, and in those jurisdictions where the defendant's answer is to be served on the plaintiff's attorney within a specified time, an entry of default would probably be regarded as erroneous if made after such service, although the pleading were not filed in court. In a case where judgment by default was entered against a defendant, who filed an answer on the same day the judgment was rendered, but it did not appear affirmatively that the answer was filed before the judgment, or that the attention of the court was called to the answer before giving judgment, it was held to be the legal presumption that the judgment was first given.⁴² Even though the plea filed by the defendant be *bad* in form or substance, yet, if it does not admit the plaintiff's case, the latter cannot have judgment for want of a plea; the proper practice is either to move to strike out the plea, or to answer it by demurrer or otherwise.⁴³ And especially after replying to a plea filed

⁴⁰ Taylor v. McNairy, 43 Miss. 276; Bedwell v. Thompson, 25 Tex. 245; Hicks v. Vaun, 4 Ark. 526; Boyer v. Robinson, 6 Ark. 552; Alexander v. Stewart, 23 Ark. 18; White v. Reagan, 25 Ark. 622; Harris v. Manuf. Co., 4 Blackf. 267, 29 Am. Dec. 373; Young v. Bank, 4 Ind. 301, 58 Am. Dec. 630; Terrell v. State, 68 Ind. 155; Wall v. Galvin, 80 Ind. 447; Lyon v. Barney, 1 Scam. 387; Miller v. Hardacre, 1 Greene (Iowa), 154; Levi v. Monroe, 11 Iowa, 453; Ruch v. Jones, 33 Mo. 393; Norman v. Hooker, 35 Mo. 366; McMurtry v. State, 19 Nebr. 147, 26 N. W. Rep. 915.

⁴¹ In an early New York case, where

a plea was delivered to the plaintiff's attorney, who searched the clerk's office, and, finding no plea on file, entered a default for want of a plea, the court considered the default as a nullity; the party is to be governed by the pleadings delivered to him, and not search the office to see whether the originals are filed. Smith v. Wells, 6 Johns. 236. But compare Wall v. Galvin, 80 Ind. 447.

⁴² Wooldridge v. Brown, 1 Tex. 478. See, *per contra*, Lyon v. Barney, 1 Scam. 387.

⁴³ Briggs v. Sholes, 14 N. H. 263. Where the admissions in an answer negative its general denials, the latter

in proper time the plaintiff cannot take judgment by *nil dicit*; if the plea is bad, he should withdraw his replication and demurrer.⁴⁴

On similar principles, it is erroneous to render a judgment by default against a defendant who has filed a *demurrer* to the declaration, when the same remains unanswered and not disposed of in any way, and he has not taken any subsequent step in the cause amounting to a waiver of the demurrer.⁴⁵ And a judgment by default, entered while exceptions are pending and undetermined, is erroneous and irregular.⁴⁶ So, pending the question whether a suit can be maintained in the court where it is brought, by reason of the alleged non-residence of the defendant, there can be no judgment against him for want of a plea.⁴⁷ But of course, after the defendant's demurrer is overruled and judgment of *respondeat ouster* given, he may be put in default for failure to answer further within the proper time.

For the same reasons, a default cannot be entered while a *motion* is pending.⁴⁸ Thus, while an application for the removal of a cause from the state court to a federal court remains undetermined, it is irregular to enter a default against the party making the application, and a motion to set aside the default in such case should be allowed.⁴⁹ So of a motion to dismiss, for want of security for costs by a non-resident plaintiff, made in due time.⁵⁰ A motion to quash the return or the summons is no waiver of the right to plead, and in such case a refusal to allow the defendant to plead, and an entry of judgment as upon default, is error.⁵¹ If the defendant's plea is *withdrawn*, the case then stands precisely as if no plea had been filed. An appearance is entered and a want or defect of service is waived by filing a plea in bar in the action, and if the plea is subsequently withdrawn,

may be disregarded, and if the complaint be verified, judgment may be asked on the former. *Tremont v. Seals*, 18 Cal. 433.

⁴⁴*Cox v. Capron*, 10 Mo. 691.

⁴⁵*Steelman v. Watson*, 5 Gilm. 249; *McKinney v. May*, 1 Scam. 584; *Key v. Hayden*, 13 Iowa, 602; *Willamette, etc., Co. v. Smith*, 1 Oreg. 181; *Hirsh v. Clawson*, 106 Ind. 329, 6 N. E. Rep. 912.

⁴⁶*Francis v. Steamer Black Hawk*, 18 La. Ann. 629.

⁴⁷*State v. Gittings*, 85 Md. 169.

⁴⁸*Atchison, T. & S. F. R. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. Rep. 512.

⁴⁹*Mattoon v. Hinckley*, 88 Ill. 208.

⁵⁰*Osprey v. Jenkins*, 9 Mo. 643.

⁵¹*Story v. Ware*, 35 Miss. 399, 72 Am. Dec. 125.

that does not operate as a withdrawal of the appearance, and the plaintiff is entitled to judgment of *nil dicit* at any time before another plea is filed.⁵² And in general, if the defendant abandons, or fails to establish, any preliminary motion or plea, he must seasonably avail himself of the opportunity accorded to answer to the merits, or he will be liable to be defaulted. Thus, where a defendant filed a motion to quash a summons, which was overruled, and refused to appear further in the action, it was held that a judgment against him, without showing an entry of default, would not be disturbed.⁵³ Leave to the plaintiff to amend his declaration, and to the defendant for time to plead, is an abandonment of all existing issues, and if the plaintiff amends his declaration, and no plea is filed to such amended declaration, the plaintiff is entitled to judgment by default.⁵⁴ Still it is irregular to enter judgment as for want of an answer, where the complaint is amended after answer but no amended answer filed, if the original answer states a defense to the cause of action shown by the amended complaint.⁵⁵ Judgment by default, without a rule to answer, should not be entered against a defendant where a motion to strike out a portion of the complaint has been allowed. "We think the defendant should be regarded as standing in the same position as though he had successfully attacked the complaint by demurrer. Even if the order of the court and the circumstances of the case required no formal amendment of the complaint, the necessity for a rule to answer would remain the same."⁵⁶

§ 87. Conclusiveness of Judgment by Default.

A judgment taken by default is conclusive, by way of estoppel, in respect to all such matters and facts as were well pleaded and properly raised and material to the case made by the declaration, or other pleadings, and such issues cannot be relitigated in any subse-

⁵² *Dart v. Hercules*, 84 Ill. 395; *Grigg v. Gilmer*, 54 Ala. 425.

⁵³ *McPherson v. First Nat. Bank*, 12 Nebr. 202, 10 N. W. Rep. 707. And see *McKellar v. Lamkin*, 23 Tex. 244.

⁵⁴ *Robinson v. Keys*, 9 Humph. 144.

⁵⁵ *First Nat. Bank v. Prescott*, 27 Wis. 616.

⁵⁶ *Mullen v. Wine*, 9 Colo. 167, 11 Pac. Rep. 54.

quent action between the parties or their privies.⁸⁷ But while a default is conclusive of all that is properly alleged in the complaint, it is conclusive of nothing more, and as a general rule it binds the defendant only in the character in which he is sued.⁸⁸ "A judgment by default is as conclusive upon the judgment defendant, as to any matter admitted by the default and adjudicated by the judgment which ensued, as any other form of judgment. But just what or how much is admitted by the default often becomes a difficult question in particular cases. The general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint. As applicable, however, to a suit to foreclose a mortgage, or other kindred suits in the nature of a proceeding *in rem*, where a party is made a defendant to answer as to his supposed or possible, but unknown or undefined, interest in the property, we think that, as against him, a default ought to be construed as an admission that, at the time he failed to appear as required, he had no interest in the property in question, and hence as conclusive of any prior claim of interest or title adverse to the plaintiff. Any less rigid rule of construction might, and in many cases doubtless would, defeat the very object properly had in view in making a party a defendant to answer as to his supposed or possible interest in the property involved, to the end that all claims to or against such property might be adjusted by the final judgment or decree, and further litigation thereby avoided."⁸⁹ Further, a judgment by default, regularly entered, is as binding as any other, as far as respects the power and jurisdiction of the court in declaring the plaintiff's right to recover, although the amount of the recovery, in some cases, may

⁸⁷ *Leonard v. Simpson*, 2 Bing. N. C. 176; *Oregon Ry. Co. v. Oregon Ry. & Nav. Co.*, 28 Fed. Rep. 505; *Derby v. Jacques*, 1 Cliff. 425; *Thatcher v. Gammond*, 13 Mass. 268; *Briggs v. Richmond*, 10 Pick. 391, 20 Am. Dec. 526; *Minor v. Walter*, 17 Mass. 237; *Gaskill v. Dudley*, 6 Met. 546, 39 Am. Dec. 750; *Newton v. Hook*, 48 N. Y. 676; *Brown v. Mayor*, 66 N. Y. 385; *McCalley v. Wilburn*, 77 Ala. 549; *Ellis v. Mills*, 23 Tex. 584; *Dunn v. Pipes*, 20 La. Ann.

276; *Ligon v. Triplett*, 12 B. Monr. 238; *Marks v. Sigler*, 8 Ohio St. 358; *McCurdy v. Baughman*, 48 Ohio St. 78, 1 N. E. Rep. 93; *Fletcher v. Holmes*, 25 Ind. 458; *Van Valkenburgh v. Milwaukee*, 45 Wis. 574; *Doyle v. Hallam*, 21 Minn. 515; *Kittridge v. Stevens*, 16 Cal. 881. *Infra*, § 697.

⁸⁸ *Unfried v. Heberer*, 63 Ind. 67.

⁸⁹ *Barton v. Anderson*, 104 Ind. 578, 4 N. E. Rep. 420, *Niblack, C. J.*

remain to be ascertained by the assessment of damages.⁶⁰ A judgment by default will also operate as a merger of the cause of action or bar to another suit for the same demand. Thus, where the defendant offers to be defaulted for a given sum, and judgment is accordingly entered for the plaintiff for that amount, such judgment is a bar to a subsequent action between the same parties for the same claim.⁶¹ But this effect is attributable only to the *final* judgment in the action. A judgment by default merely admits a cause of action; but while the precise character of the cause of action, and the extent of the defendant's liability, remains to be determined by a hearing in damages and final judgment thereon, the cause of action is not merged in the judgment, and the rights of the parties, beyond the mere admission of a cause of action, are neither strengthened nor impaired thereby.⁶²

§ 88. Entry by the Clerk.

The clerk of the court, in entering a judgment by default, acts merely in a ministerial capacity, no intendments can be made in support of the validity of his acts, and unless he conforms strictly to the provisions of the statute, his proceedings will be irregular and not binding.⁶³ For instance, under a statute providing that the clerk may enter in vacation a judgment by default upon proof of personal service of a summons on the defendant, a judgment entered out of term by the clerk, unless there is such proof, is void.⁶⁴ But where the jurisdiction of the clerk to enter the judgment is not denied, it may be made a question how far his mistakes, misprisions, or irregular actions will impair the validity of the judgment. The authorities would not warrant the statement that the judgment in

⁶⁰ *Mailhouse v. Inloes*, 18 Md. 328; *Green v. Hamilton*, 16 Md. 817, 77 Am. Dec. 295; *Loney v. Bailey*, 43 Md. 10; *Clark v. Compton*, 15 Tex. 32; *Mississippi & Tennessee R. Co. v. Green*, 9 Heisk. 588; *Gatling v. House*, 66 N. Car. 374.

⁶¹ *Hanscom v. Hewes*, 13 Gray, 334.

⁶² *Welch v. Wadsworth*, 80 Conn. 149, 79 Am. Dec. 289.

⁶³ *Kelly v. Van Austin*, 17 Cal. 564; *Files v. Robinson*, 30 Ark. 487; *Providence Tool Co. v. Prader*, 32 Cal. 634, 91 Am. Dec. 598; *Curry v. Roundtree*, 51 Cal. 184.

⁶⁴ *McConkey v. McCraney*, 71 Wis. 576, 37 N. W. Rep. 822.

such case would be entirely void. On the contrary, they hold that it would be merely erroneous, and that the error could be cured by motion in the court below or corrected on appeal. This is the position taken with reference to cases in which the clerk, by mistake, has entered judgment for an amount in excess of the real recovery.⁶⁶

§ 89. Interlocutory Judgment, when necessary.

It is important to be noted that the entry of a default is not necessarily, or not always, the final judgment in the action. In the language of the supreme court of Vermont, "the mere entry of a default does not involve and amount to the rendering of a final judgment. The default is an incident, which entitles the plaintiff to a judgment, but does not determine either the kind or amount of such judgment. The rendering of the judgment is to supervene upon and succeed the entry of the default, and may require intervening proceedings in the case, in order to enable the court to render such a judgment as to law appertains."⁶⁷ And the general rule is that if the action is brought on a contract or promise for a liquidated sum of money, or if the amount to be recovered can be ascertained by a mere matter of calculation, then a final judgment may be at once entered for such amount; but if the action sounds in tort, or claims specific relief, or if the damages must be computed or liquidated otherwise than by simple calculation, or depend upon evidence, then an interlocutory judgment will first be entered, and the case proceed to the assessment of damages in some method known to the law, after which a final judgment will be rendered for the amount so assessed.⁶⁸ In a case of the latter kind, the prior entry of an interlocutory judgment is important to the regularity of the proceedings, though its omission would probably not be absolutely fatal. In a case where the record disclosed the fact that the court referred the matter to the clerk for the assessment of damages without first rendering an interlocutory judgment against the defendants for want of

⁶⁶ *Lenoir v. Broadhead*, 50 Ala. 53; *Bond v. Pacheco*, 30 Cal. 530.

⁶⁷ *Sheldon v. Sheldon*, 37 Vt. 152.

⁶⁸ See *Holmes v. Lewis*, 2 Wia. 33; *Kenum v. Henderson*, 6 Ala. 132.

a plea, as the law required, the appellate court said: "In this we think there is manifest error."⁶⁸ An action upon an open account for goods sold and delivered, for services rendered, or the like, is not upon a liquidated demand such that final judgment may be entered for the amount claimed upon failure to answer.⁶⁹ A final judgment by default cannot be rendered in an action of detinue.⁷⁰ Nor is such judgment proper upon a note payable in Confederate money; "a jury should have assessed the value of the contract [note], upon a writ of inquiry, before the judgment was made final."⁷¹ In some of the states, under statutes authorizing constructive service of process by publication in certain cases, it is provided that an interlocutory judgment by default shall be entered upon the defendant's failure to appear, which can only be made final at the succeeding term of court.⁷² There is one other instance in which an interlocutory judgment should precede the entry of final judgment by default in an action, viz: upon the overruling of defendant's demurrer (in certain cases) or dilatory plea. Here the practice is to give judgment that he "answer over," after which, and on his failure to plead to the merits, he may be defaulted. But if the record shows that the defendant had an opportunity to answer over and refused to do so, judgment by *nil dicit* is good, without an entry of a formal judgment of *respondeat ouster*.⁷³

§ 90. Assessment of Damages.

After the interlocutory judgment by default has been entered in an action for unliquidated damages or an unascertained sum, the next step is to assess the plaintiff's damages. This process, as followed at common law, has been described in the following language: "According to the common law, when there was an interlocutory

⁶⁸ *Wilcox v. Field*, 1 Colo. 8. But in a later case it is said that a default may be recited and entered against a defendant who does not plead, as well at the time of the rendition of the final judgment as before. *Manville v. Parks*, 7 Colo. 128, 2 Pac. Rep. 212.

⁶⁹ *Wolf v. Hamberg*, 8 S. Car. 82; *Rogers v. Moore*, 86 N. Car. 85.

⁷⁰ *Studdert v. Hassell*, 6 Humph. 187.

⁷¹ *Williams v. Rockwell*, 64 N. Car. 825.

⁷² *Lombard v. Clark*, 88 Mo. 808.

⁷³ *Haldeman v. Starrett*, 28 Ill. 393.

judgment, whereby the right of the plaintiff was established but the *quantum* of damages sustained by him was not ascertained, the plaintiff was entitled to the intervention of a jury to ascertain his damages. This is the case where the defendant suffers judgment to go against him by default, or *nil dicit*, that is, where he puts in no plea at all to the plaintiff's declaration, or by *non sum informatus*, where the defendant's attorney declares he has no instructions to say anything in answer to the plaintiff or in defense of his client. This is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. But where damages are to be recovered, a jury must be called in to assess them, unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is 'that the plaintiff ought to recover his damages, but because the court knew not what damages the plaintiff hath sustained, therefore the sheriff is commanded that by the oaths of twelve honest and lawful men he inquire into said damages, and return such inquisition into court.' This process is called a writ of inquiry, in the execution of which the sheriff sits as judge and tries by a jury, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff has really sustained; and when their verdict is given, which must assess some damages, the sheriff returns the inquisition, which is entered upon the roll in the manner of a *postea*, and thereupon it is considered that the plaintiff do recover the exact sum of damages so assessed."⁷⁴ Now this common law method is greatly modified, in the different states, by variations of local practice. In few, if any, is the writ of inquiry still executed by the sheriff as above described; in some, no such writ issues, but the order for assessing damages is executed in court, by the judge, with or without the aid of a jury, or by a referee or auditor. The important question is as to the constitutional right of trial by jury. Under the clause found in many of the state constitutions,

⁷⁴Hickman v. Balt. & Ohio R. Co., 80 W. Va. 296, 4 S. E. Rep. 654, citing 3 Bl. Comm. 897, 898; Steph. Pl. 183, 184; Tidd, Pr. 295-297; Brill v. Neele, 1 Chit. 619; 4 Minor, Inst. pt. 1, 648.

providing that in suits at common law, where the value in controversy exceeds a certain sum, the right of trial by jury shall be preserved, it has been held that the defendant has an absolute and indefeasible right, guarantied by the constitution, to demand that the question of damages be tried by a jury.⁷⁵ There is, however, reasonable ground for the theory that the defendant, by suffering a default in the first instance, has voluntarily renounced his right to have a jury called in *any* of the proceedings in the action.⁷⁶

§ 91. Evidence on Assessment of Damages.

A default admits the cause of action and the material and traversable averments of the declaration, although not the amount of damages; and upon the proceeding for their assessment, the amount of damages is all that the plaintiff is required to prove or the defendant is permitted to controvert.⁷⁷ The former must produce whatever evidence is necessary to fix the amount of his claim with precision. Thus a judgment by default in *assumpsit*, where an account is filed in the declaration, is an admission of indebtedness for the articles charged, but the value of the articles and the amount of the items require to be proved.⁷⁸ As for the defendant, he may offer any evidence which is confined to the question of damages solely or which goes in mitigation or reduction of damages; but evidence tending to deny the cause of action, or to show that a right of action does not exist, or to avoid the alleged contract, is irrelevant and inadmissible.⁷⁹

⁷⁵ *Hickman v. Balt. & Ohio R. Co.*, 30 W. Va. 296, 4 S. E. Rep. 654.

⁷⁶ *Hopkins v. Ladd*, 85 Ill. 178; *Seeley v. Bridgeport*, 53 Conn. 1; *Raymond v. Railroad*, 43 Conn. 596.

⁷⁷ *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Russ v. Gilbert*, 19 Fla. 54; *Maud v. Loeb* (Ala.), 6 South. Rep. 376.

⁷⁸ *Patrick v. Ridgway*, 4 Har. & J. 812; *Durden v. Carhart*, 41 Ga. 76.

⁷⁹ *Lambert v. Sanford*, 55 Conn. 487, 12 Atl. Rep. 519; *Lee v. Knapp*, 90 N.

Car. 171. "We are clearly of opinion that the judgment by default precluded the defendant from using, for the purpose of reducing the damages, testimony which would have defeated the action had a plea in bar been put in. A default admits all the material averments properly set forth in the declaration, and of course everything essential to establish the right of the plaintiff to recover. Any testimony, therefore, tending to prove that no right of action existed, or denying the cause of action,

§ 92. Amount of the Recovery.

A judgment by default for a sum greater than that prayed for in the complaint is irregular and erroneous.⁸² And, generally speaking, where the prayer is for specific relief, the plaintiff is confined to a recovery in strict accordance with what he has asked for.⁸³ If a plea admits a part of the debt sued for, without a tender, the plaintiff may take judgment by *nil dicit* for such amount.⁸⁴ A judgment by default on a note, upon which is an indorsement of a credit by the plaintiff, ought to be entered subject to such credit.⁸⁵

§ 93. Judgment by Default not aided by Presumptions.

On appeal from a judgment by default, nothing will be presumed in its favor; the record must show affirmatively the existence of every material fact to give the court jurisdiction, and that all the proceedings were in accordance with law.⁸⁶ "It is a well settled rule of practice that where a judgment is taken by default against a defendant in an action, the record must affirmatively show that process had been duly served the required length of time before the default was taken."⁸⁷

is irrelevant and inadmissible." *Garrard v. Dollar*, 4 Jones (N. Car.), 175, 67 Am. Dec. 271 (Battle, J.), citing 2 Sell. Pr. 25; *De Gaillon v. L'Aigle*, 1 Bos. & P. 358; *East India Co. v. Glover*, 1 Stra. 612; *Foster v. Smith*, 10 Wend. 377.

⁸² *Gage v. Rogers*, 20 Cal. 91; *White v. Snow*, 71 N. Car. 232; *Johnson v. Mantz*, 69 Iowa, 710, 27 N. W. Rep. 467.

⁸³ *Burling v. Goodman*, 1 Nevad. 314. But in *Weaver v. Gardner*, 14 Kans. 347, in an action on a note and mortgage in which the summons was indorsed with the amount due on the note, and for which a personal judg-

ment was asked, but without any statement of a claim for other relief, it was held no error to enter on default a decree for the sale of the mortgaged premises as well as a judgment for the sum indorsed on the summons.

⁸⁴ *Williams v. Harris*, 2 How. (Miss.) 627. See *Allen v. Watt*, 69 Ill. 655.

⁸⁵ *Rees v. Bank*, 5 Rand. 326, 16 Am. Dec. 755.

⁸⁶ *Hudson v. Breeding*, 7 Ark. 445; *Elligood v. Cannon*, 4 Harringt. 176; *Connolly v. Railroad*, 39 Ala. 378; *Schloss v. White*, 16 Cal. 65.

⁸⁷ *Eltzroth v. Voris*, 74 Ind. 459.

§ 94. Opening and Vacating Judgments by Default.

A judgment taken against a defendant by default will be opened or set aside, on his motion, in the court wherein it was entered, for a failure of jurisdiction or for certain classes of errors and irregularities; and also, by statute in some of the states, when it was given in consequence of his "mistake, inadvertence, surprise, or excusable neglect." But in respect to the exercise of this power, judgments by default are not differentiated from any other species of judgment, except in so far as certain special statutes are applicable to them, and except that practically they constitute by far the largest class of cases in which applications for such relief are made. And for this reason it is not proposed to examine the subject in detail in this connection, but the reader is referred to the later chapters of this work in which the vacating and opening of judgments in general will be fully discussed.⁸⁵

§ 95. Review of Judgments by Default.

An appeal will lie from a judgment entered upon the default of the defendant, in a proper case, as well as from any other judgment. "There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury, and in the former, as well as in the latter case, the error may be corrected on appeal."⁸⁷ We have already seen that such a judgment will be reversed when founded upon a pleading which does not state a cause of action.⁸⁸ And it remains to be stated that the appellate court has power to deal with it and to correct or reverse it on account of a failure to comply with the statutory directions, or mistakes of the court or clerk, or any errors or irregularities which would vitiate a judgment otherwise rendered.

⁸⁵ See *infra* §§ 297-355.

⁸⁷ *Stevens v. Ross*, 1 Cal. 94.

⁸⁸ *Supra*, § 84.

CHAPTER V.

ARREST OF JUDGMENT.

- § 96. Arrest of Judgment at Common Law.
- 97. When the Motion should be made.
- 98. Grounds for Arrest of Judgment.
- 99. Defect of Parties.
- 100. Insufficient or Faulty Pleadings.
- 101. Joinder of Good and Bad Counts.
- 102. Misjoinder of Causes of Action.
- 103. Objections to the Jury.
- 104. Irregular or Defective Verdict.
- 105. Grounds held insufficient.

§ 96. Arrest of Judgment at Common Law.

The arrest of judgment is defined as the withholding or staying of judgment, notwithstanding a verdict has been given, on the ground that there is some error appearing on the face of the record which vitiates the proceedings.¹ But the errors which will justify a motion in this behalf must be errors of substance, and not merely clerical or formal mistakes. If they belong to the latter class, they will be cured by the statutes of amendments and jeofails, which have introduced a much more liberal practice in this respect than had formerly obtained. According to Blackstone, "arrests of judgment arise from intrinsic causes, appearing upon the face of the record." And he enumerates the grounds which will be sufficient to prompt this action of the court, as follows:—where the declaration varies totally from the original writ; where the verdict materially differs from the pleadings and issue thereon; and where the case laid in the declaration is not sufficient in point of law to found an action upon.² In this country, motions in arrest of judgment, at least in civil cases, are not especially favored. The liberality of the statutes and the indulgence of the courts,

¹ Bouvier, Law Dict.; Brown, Law Dict., citing Steph. Plead. 106; Roscarla v. Thomas, 6 Jur. 929.

² 3 Bl. Comm. 393.

in permitting amendments and in taking defects as cured by the verdict if not duly objected to, have taken away most of the grounds on which a motion of this character could be predicated, and this reduction is still further promoted by the facility of obtaining new trials. Indeed, a motion in arrest of judgment is now usually coupled with a motion for a new trial, the latter being the real and important object of the application. And in some of the states the practice of arresting judgments is entirely abolished. In Maine, for example, it is provided by law that no motion in arrest of judgment in any civil action shall be sustained in the courts of that state.³ It is of course only the defendant who can move in arrest of judgment. If the defendant has obtained a verdict upon a plea which confesses the cause of action and does not sufficiently avoid it, the proper course for the plaintiff, as we have already seen, is to move for judgment *non obstante veredicto*.⁴

§ 97. When the Motion should be made.

By the English practice, a motion in arrest of judgment may be made at any time before judgment is actually entered up. In the absence of statutes, it is probable that a similar rule would be applied in our own courts. But at all events it seems clear that a motion of this kind cannot be granted after the rendition and entry of a final judgment in the cause; at that stage the only remedy is by motion to strike out.⁵ But where the law provides that the motion may be made at any time before the adjournment of the term at which the case is finally disposed of, it is held that the defendant's right to so move will not be defeated by the entering up of a judgment by the plaintiff on the record before the adjournment of such term.⁶ In some states it is provided that a motion in arrest shall be made within four days of the rendition of the judgment; and when this is the case, the motion is too late if filed after the final adjournment of the term at which the judgment is entered.⁷ It is held to be the cor-

³ *Stetson v. Corinna*, 44 Me. 29; Rev. Stat. Me. c. 82, § 81.

⁴ *Supra*, § 18.

⁵ *Keller v. Stevens*, 66 Md. 132, 6 Atl.

Rep. 538; *Colchin v. Ninde* (Ind.), 23 N. E. Rep. 94.

⁶ *Hartridge v. Wesson*, 4 Ga. 101.

⁷ *State v. Leathers*, 61 Mo. 381.

rect rule of practice, not to entertain a motion in arrest of judgment after the overruling of a demurrer to the declaration.⁸ And clearly, matter objected to by demurrer and decided upon cannot be afterwards urged in arrest of judgment.⁹ But a motion of this character may be received after a decision on a motion for a new trial.¹⁰

§ 98. Grounds for Arrest of Judgment.

As a general rule, a judgment can be arrested only for some matter appearing, or the omission of some matter which ought to appear, on the face of the record itself.¹¹ "A motion in arrest of judgment reaches only such defects as are apparent on the face of the record, and as are not cured by the verdict or some statute of amendments, or waived by failing to demur."¹² This motion, in other words, "does not perform the office of calling the attention of the court to rulings which constitute matters of exception. It can not, therefore, be used as a substitute for a motion for a new trial. It reaches only those defects which are apparent on the face of the record proper, and does not reach such as require to be brought to the

⁸Rouse v. Peoria County, 2 Gllm. 99; Independent Order of Mutual Aid v. Paine, 123 Ill. 625, 14 N. E. Rep. 49, (citing 2 Tidd's Prac. 918); Chicago & E. I. R. Co. v. Hines (Ill.), 28 N. E. Rep. 1021.

⁹Freeman v. Camden, 7 Mo. 298.

¹⁰Wilkinson v. Daniel, Wright, 368.

¹¹Burnett v. Ballund, 2 Nott & M. 435; Watts's Case, 4 Leigh, 672; State v. George, 8 Ired. 324, 49 Am. Dec. 392; State v. Douglass, 63 N. Car. 500; State v. Allen, R. M. Charlt. 518; Brown v. Lee, 21 Ga. 159; Garner v. State, 42 Ga. 208; Frank v. State, 39 Miss. 705; State v. Addison, 15 La. Ann. 185; Case v. State, 5 Ind. 1.

¹²Balliett v. Humphreys, 78 Ind. 388. In a recent case, judgment having been rendered without the intervention of a jury on two notes, one of which was not due at the time the action was

brought, defendant moved to arrest the judgment, on the ground that the plaintiff had not given evidence to establish his right to recover, and that the judge had no authority to render judgment; *held*, that as the defects alleged to exist in the judgment appeared on the face of the record, a motion in arrest was the proper remedy and should have been granted. Sanner v. Sayne, 78 Ga. 467, 3 S. E. Rep. 651. In the case of Court of Probate v. Sprague, 8 R. I. 205, it was said: "As a general rule, judgment cannot be arrested if it appears upon the whole record for which party judgment ought to be given. If, on the other hand, taking all the facts admitted by the pleadings, and such as are established by the verdict, the court cannot determine for which party judgment should be, judgment must be arrested." But at com-

notice of the court by proof *aliunde*."¹³ Much less, of course, can such a motion be supported by matter which becomes part of the record after the motion has been overruled.¹⁴ It is stated to be an invariable rule, with regard to the arrest of judgment, that whatever is alleged for this purpose must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea.¹⁵ That is, motions in arrest are governed in general by the principles applicable to demurrers, and no greater indulgence is shown to the defendant, in respect to his objections thus urged, than if they had taken the shape of a demurrer. In fact, as a consequence of the statutes of amendments and the doctrine of cure by verdict, much greater severity is shown to motions in arrest. So that it is by no means true that any thing which would have supported a demurrer will be good ground for arresting the judgment. "Exceptions that are moved in arrest of judgment must be much more material and glaring than such as will maintain a demurrer, or, in other words, many inaccuracies and omissions, which would be fatal if early observed, are cured by a subsequent verdict, and not suffered, in the last stage of a cause, to unravel the whole proceedings."¹⁶

§ 99. Defect of Parties.

The objection that there is a defect of parties cannot be raised by motion in arrest of judgment, but only by demurrer or answer, and it is waived by going to trial without exception.¹⁷ So a misjoinder of parties as plaintiffs is no ground for arresting the judgment.¹⁸ Nei-

mon law, the practice in such a case would be to award a repleader. *Supra*, § 16.

¹³ *White v. Caldwell*, 17 Mo. App. 691.

¹⁴ *Heward v. State*, 21 Miss. 281.

¹⁵ *Washington Road v. State*, 19 Md. 239; *State v. James*, 2 Bay, 215; *Sedgwick v. Dawkins*, 18 Fla. 335.

¹⁶ 3 Bl. Comm. 194.

¹⁷ *Reugger v. Lindenberger*, 53 Mo. 364; *Yonley v. Thompson*, 30 Ark. 399.

¹⁸ *Little Rock & Ft. Smith R. Co. v. Dyer*, 35 Ark. 360; *Demeritt v. Mills*, 59 N. H. 18. But in an early Massachu-

setts case, in *case* by husband and wife against defendant for driving his horse and chaise against the plaintiff's chaise, by which the wife was thrown out and injured, it was alleged that the husband had lost the labor and comfort of his wife, and had been put to great expense in her cure, etc., and after verdict for the plaintiff, judgment was arrested, because injuries were charged in the action for which husband and wife could not be joined. *Barnes v. Hurd*, 11 Mass. 59.

ther is an objection that some of the defendants are non-residents.²⁰ And where an action was pending in the name of a firm, as plaintiffs, in the style of L. & Co., and L. died before the trial, and the names of the other partners did not appear of record, it was considered that this furnished no ground for a motion in arrest of judgment, the death itself not being shown by the record.²¹ Nor will judgment be arrested because of an ordinary mis-spelling of a party's name.²² On the other hand, where an objection of this character is supported by the face of the record, it may in some instances be adequate ground for arresting the judgment. Thus, where the law requires that suits shall be brought in the name of the **real party in interest**, a motion to arrest a judgment in favor of the assignor of a note "to the use of" the assignee should prevail.²³

§ 100. Insufficient or Faulty Pleadings.

A motion in arrest of judgment must be founded on matter of record; and if the declaration or complaint contains a substantial cause of action, the judgment will not be arrested on account of an irregularity or defect which is amendable, or which has been waived by appearance or going to trial.²⁴ In other words, if the plaintiff's *manner* of stating his title or setting out his cause of action be objectionable and defective, though the title itself appears to be good in law, advantage must be taken of the defect before a verdict is rendered. But if, giving him the benefit of all intendments and inferences, the title or cause of action *itself* appears from the declaration to be defective and bad in law, so that his averments do not make out a substantial ground of suit, then judgment will be arrested on the defendant's motion; because such a defect cannot be cured by verdict, and the court cannot presume that a cause of action was proved where none was stated.²⁵ An admirable illustration of this rule is furnished by a re-

²⁰ Washington etc. Tel. Co. v. Hobson, 15 Gratt. 122.

²¹ Rountree v. Lathrop, 69 Ga. 539.

²² Railroad v. Ingraham, 77 Ill. 309.

²³ Hutchings v. Weems, 35 Mo. 285.

²⁴ Parker v. Abrams, 50 Ala. 35; Les-

ter v. Insurance Co., 55 Ga. 475; Spahr v. Nicklaus, 51 Ind. 221; Merritt v. Dearth, 48 Vt. 65.

²⁵ Bedell v. Stevens, 28 N. H. 118; Gould v. Kelley, 16 N. H. 551; Jaccard v. Anderson, 32 Mo. 188; Smith v. Cur-

cent decision in Indiana, where an action was brought under a statute which provided that the personal representative of one killed by the wrongful act of another might maintain an action therefor in his own name for the benefit of the widow and children, or next of kin, of the deceased. The petition in this case failed to allege the existence of any widow, children, or next of kin, and it was held that a motion in arrest of judgment was properly sustained, because the existence of persons beneficially interested was essential to the plaintiff's suit, and without that allegation his petition did not disclose a cause of action.²⁶ But in stating that a judgment will be arrested if the petition fails to disclose a cause of action, reference is of course made to substantial and not formal omissions. The latter are supplied by intendment, and will be presumed after verdict to have been proved. If the defects are merely of omission, and if, when supplied, a complete case would be made out, the omission being of facts which the jury must have found, then the judgment is a legitimate sentence of the law.²⁶ Thus judgment will not be arrested, after verdict, for any defect in pleading which would not have been fatal on general demurrer; nor then, if the court can presume the defect to have been supplied by proof before the jury.²⁷ Further, upon a motion of this kind, the plaintiff is entitled to the benefit of any legitimate inference or intendment that can be brought to bear upon the allegations of his declaration. Hence the rule that judgment will not be arrested for

ry, 16 Ill. 147; *Philson v. Bampfield*, 1 Brevard, 202. In *Walpole v. Marlow*, 2 N. H. 385, the rule is thus stated by Chief Justice Richardson: If the title stated in the declaration be defective, the judgment must be arrested; but if the title be defectively stated, the defect is cured by verdict. The true distinction between the two is this: When any particular fact is essential to the validity of the plaintiff's title, if such fact is neither expressly stated in the declaration, nor necessarily implied from the facts which are stated, the title must be considered as defective and judgment must be arrested; but if such fact, although not expressly stated, be

necessarily implied from what is stated, the title must be considered as only defectively stated, and the defect is cured by verdict.

²⁶ *Stewart v. Terre Haute & L. R. Co.*, 108 Ind. 44, 2 N. E. Rep. 208.

²⁷ *Saulsbury v. Alexander*, 50 Mo. 143; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171. An omission of the formal concluding words of a pleading cannot be taken advantage of by a motion in arrest of judgment; it can only be objected to by special demurrer. *Stearns v. Stearns*, 32 Vt. 678.

²⁸ *Higgins v. Bogan*, 4 Harringt. 330; *Woods v. State*, 10 Mo. 698.

lack of an essential averment in the declaration which is contained by implication in the averments used, or which may be considered to have been proved as a part of what is alleged.²⁰ On a motion in arrest the whole record is before the court, and where a defect in the petition is waived of record by the defendant, the motion will not be granted on account of such defect.²¹ Aside from the question of omissions, the general rule also prescribes that irregularities or informalities in the manner of setting out the cause of action are not open to exception after verdict. As an illustration of this, it is held that an objection that the complaint, in an action for damages for breach of contract, treats each breach as a separate and independent cause of action, and sets forth the same in a distinct count, is not available upon a motion in arrest of judgment.²² Nor need the plaintiff anticipate defenses; it is no cause for arresting judgment that the declaration on its face shows the cause of action to have been barred.²³ Nor that the complaint only warrants a recovery of nominal damages.²⁴ So again, a traverse by one party of matter not alleged by the other, in addition to the matter properly in issue, is mere surplusage and not a ground of arrest.²⁵ Nor can the question of the propriety of allowing an amendment to be made in the pleadings be reached on motion in arrest.²⁶

§ 101. Joinder of Good and Bad Counts.

In regard to the misjoinder of counts in a declaration, or the joinder of good and bad counts, the English rule is stated to be as follows: Where general damages are found on a declaration consisting of several counts, which are good but cannot be joined, the proper course is to arrest the judgment; where some of the counts are good and others bad, a *venire de novo* issues; but in the

²⁰ *Rea v. Harrington*, 58 Vt. 181, 2 Atl. Rep. 457 (citing *Morey v. Homan*, 10 Vt. 565; *Curtis v. Burdick*, 48 Vt. 166); *Bedell v. Stevens*, 28 N. H. 118; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207.

²¹ *Auld v. Butcher*, 2 Kans. 185.

²² *Pickering v. Migs. &c. Tel. Co.*, 47 Mo. 457. And see *Baden v. Clarke*, 1 Gill, 165.

²³ *Allen v. Word*, 6 Humph. 284.

²⁴ *Reagan v. Fox*, 45 Ind. 8.

²⁵ *Robbins v. Wolcott*, 19 Conn. 356.

²⁶ *Le Strange v. State*, 58 Md. 26.

case of a single count containing good and bad causes of action, the court will neither arrest the judgment nor grant a *venire de novo*, inasmuch as it will be intended that the damages were given in respect of the good cause of action only.³⁵ And a similar rule obtains in some of the American states, viz., that if a general verdict for the plaintiff be taken upon several counts in a declaration, and one of the counts is fatally defective, judgment will be arrested on motion, though other counts, not liable to objection, were covered by the verdict.³⁶ As we have already seen, some of the American authorities manifest a decided reluctance (though this disposition is not universal) to presume in favor of the validity of a judgment which may, for aught that appears on the record, be composed in part of damages given in respect of a bad count.³⁷ Still, in several of the states, it is apparently settled law that where a general verdict is returned, the judgment will not be arrested unless *all* the counts of the declaration, or paragraphs of the complaint, are so defective as not to have been cured by the verdict or finding.³⁸ Thus in New Hampshire, judgment will not be arrested because the declaration may contain some claims that are illegal, if it also contains others upon which the plaintiff may properly recover.³⁹

§ 102. Misjoinder of Causes of Action.

A misjoinder of counts and causes of action, apparent upon the declaration, with damages assessed entire, is good cause for arresting the judgment on motion after verdict, or for reversing the judgment by writ of error.⁴⁰ Thus a motion in arrest will be granted when the petition contains matters of equitable jurisdiction mixed and blended with matters of legal cognizance, in the states where the distinction is still observed.⁴¹ And in Missouri, where several

³⁵ Kitchenman v. Skeel, 8 Exch. 49.

³⁶ Sylvester v. Downer, 18 Vt. 32; Needham v. McAuley, 18 Vt. 68; Bank of Carlisle v. Hopkins, 1 T. B. Mon. 245, 15 Am. Dec. 113.

³⁷ *Supra*, § 84.

³⁸ Hoag v. Hatch, 23 Conn. 585; Sims v. Dame, 118 Ind. 127, 15 N. E. Rep. 217.

³⁹ Conway v. Jefferson, 46 N. H. 521.

⁴⁰ Haskell v. Bowen, 44 Vt. 579. Judgment will be arrested on motion, if counts in *case* for false warranty and in *assumpsit* are joined. Joy v. Hill, 36 Vt. 333.

⁴¹ Meyers v. Field, 37 Mo. 434.

causes of action are united in the same petition, the verdict, if found for the plaintiff, must be rendered and the damages assessed upon each cause of action separately, otherwise judgment will be arrested.⁴³

§ 103. Objections to the Jury.

An objection to the mode of drawing and impanelling the grand jury cannot be made the ground of a motion in arrest of judgment.⁴⁴ Nor will any objection to an individual juror, which would not be sufficient ground for a principal challenge, be good cause for arresting the judgment.⁴⁵ It appears, however, that when a cause is tried in a court of record before a less number of jurors than a party is entitled to, and his consent to such a trial does not expressly appear of record, he may take advantage of the objection by motion in arrest; and in such case no exceptions to the panel need be saved at the trial.⁴⁶ It is generally held—in accordance with the rule that judgment will be arrested only for matter of record—that misconduct of the jury, or improper influence brought to bear upon them, after they have retired to make up a verdict, is no ground for a motion in arrest, although it may furnish cause for granting a new trial.⁴⁷ So the fact that the jury, when out, were under the charge of an unsworn officer, is not technically ground for a motion in arrest of judgment, though it may be for a new trial.⁴⁸

⁴³ *Pitts v. Fugate*, 41 Mo. 405.

⁴⁴ *State v. Swift*, 14 La. Ann. 837.

⁴⁵ *Chapman v. Wells, Kirby*, 183.

⁴⁶ *Cox v. Moss*, 58 Mo. 482; *Brown v. Railroad*, 87 Mo. 298.

⁴⁷ *Brister v. State*, 26 Ala. 107. Connecticut apparently stands alone in permitting a different practice. It is there held that on a motion in arrest of judgment for misconduct of a juror—*as*, conversing with one not of the jury upon the merits of the cause,—it must be averred that the party making the motion was ignorant of such misconduct until after the verdict was rendered, otherwise the motion will not prevail.

Woodruff v. Richardson, 20 Conn. 288. And in another case, where the jury took with them a paper which had been used on the trial to refresh the memory of a witness, but which was not read or offered in evidence, nor were its contents communicated to the other side, and had the same before them in all their deliberations, and the paper was calculated to affect the verdict, it was *held*, that this was a sufficient ground for arresting the judgment. *Clarke v. Whitaker*, 18 Conn. 543, 46 Am. Dec. 887.

⁴⁸ *McCann v. State*, 17 Miss. 465.

§ 104. Irregular or Defective Verdict.

At common law, one of the principal grounds for arresting a judgment is the objection that the verdict is not responsive to the issues, or that it differs in a material respect from the pleadings and the issue formed thereon.⁴⁸ So if the verdict is upon an insufficient count, or finds a fact which disaffirms the plaintiff's right to recover, or omits to find a material issue joined in the cause, the judgment will be arrested.⁴⁹

§ 105. Grounds held insufficient.

A motion in arrest of judgment on a verdict, based solely upon the ground that the evidence adduced at the trial was not sufficient to make out the plaintiff's case, will not be sustained;⁵⁰ nor, in general, a motion based on any matters which took place on the trial.⁵¹ Nor can a motion in arrest of judgment reach a defect in the form of the judgment, for the obvious reason that the motion must precede the rendition of the judgment.⁵² And the failure to serve the defendants in an action with copies of the declaration, as required by the rules and practice of the court, constitutes no ground for arresting the judgment.⁵³

⁴⁸ Young v. Wickliffe, 7 Dana, 447; 3 Bl. Comm. 398. The illustration given by Blackstone is this: "If, in an action for words, it is laid in the declaration that the defendant said 'the plaintiff is a bankrupt,' and the verdict finds specially that he said 'the plaintiff *will* be a bankrupt.'"

⁴⁹ Keirle v. Shriver, 11 Gill & J. 405.

⁵⁰ Lovell v. Sabin, 15 N. H. 29; Bright

v. State, 90 Ind. 843; Powe v. State, 48 N. J. L. 34, 2 Atl. Rep. 602. But in Allen v. Word, 6 Humph. 284, it is held that a judgment will be arrested on the ground of a variance between the pleadings and the proof.

⁵¹ Walker v. Sargeant, 11 Vt. 337.

⁵² Smith v. Dodds, 85 Ind. 452.

⁵³ Loney v. Bailey, 48 Md. 10.

CHAPTER VI.

THE RENDITION AND ENTRY OF JUDGMENTS.

- § 106. Distinction between Rendition and Entry.
- 107. Power and Duty of the Court to render Judgment.
- 108. Application and Order for Judgment.
- 109. Signature of Judge.
- 110. Entry by the Clerk.
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- 124. The Judgment-Roll, or Record.
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§ 106. Distinction between Rendition and Entry.

The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict.¹ The entry of a judgment is a ministerial act, which consists in spreading upon the

¹The whole question, then, appears to resolve itself into this—whether the rendition of judgment is a judicial act, to which the direct agency of the court is indispensable, and to which the mind of the court is to be judicially applied, or whether, after verdict has been rendered, it is a ministerial act, which may be performed by the clerk without an order by the court. When presented

in this elementary form, the question appears to me exceedingly clear and free from doubt. If there be any one thing done in the progress of a cause, from its commencement to its conclusion, that is peculiarly and emphatically a judicial act, it is the rendition of judgment." *Per* Ware, Dist. J., in *Goddard v. Coffin*, Daves, 381. And see *Matthews v. Houghton*, 11 Me. 377.

record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. It is the former, therefore, that is the effective result of the litigation. In the nature of things, a judgment must be rendered before it can be entered. And not only that, but though the judgment be not entered at all, still it is none the less a judgment. The omission to enter it does not destroy it, nor does its vitality remain in abeyance until it is put upon the record. The entry may be supplied, perhaps after the lapse of years, by an order *nunc pro tunc*. But it must not be supposed that this proceeding is required to give existence and force, by retrospection, to that which before had none. As is said by the supreme court of California: "The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, or of limiting the time within which the right may be exercised, or in which the judgment may be enforced; and the other, for the purpose of creating a lien by the judgment upon the real property of the debtor. But neither is necessary for the issuance of an execution upon a judgment which has been duly rendered. Without docketing or entry, execution may be issued on the judgment and land levied upon and sold, and the deed executed by the sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it."² And it follows, *a fortiori*, that if the entry, though attempted to be made in due form, does not correctly record the sentence of the court, or is defective or ambiguous or otherwise exceptionable, still this will not weaken the force of the judgment as a judgment. There are certain purposes, however, for which a judgment is required to be duly entered before it can become available or be attended by its usual incidents. Thus, as above remarked, this is a prerequisite to the right to appeal. And so a judgment must commonly be docketed before it can create a lien upon land, and in some of the states (though not

²Los Angeles County Bank v. Raynor, 61 Cal. 145.

all) the priority among different liens is determined by their respective dates of docketing.³ And again, the record entry of a judgment is indispensable to furnish the *evidence* of it, when it is made the basis of a claim or defense in another court. But with these exceptions, a judgment is independent of the fact of its entry. And in all cases, the distinction between rendition and entry is substantial and important.

§ 107. Power and Duty of the Court to render Judgment.

It is the duty of the court, when the necessary facts have been lawfully determined by regular proceedings, to render the proper judgment, and to refrain from any re-opening of the issues.⁴ So the failure of the trial court to enter judgment for the plaintiff for an amount admitted by the defendant to be due and tendered in court, is error for which the judgment will be reversed.⁵ And a second final judgment or decree cannot be rendered between the same parties upon the same pleadings and subject-matter, until the first has been reversed, or opened and vacated.⁶ The authority of the court to render a judgment does not always depend upon the fact that regular proceedings have taken place and culminated in a verdict; it may, in some cases, rest upon the consent or agreement of the parties. Thus a stipulation by the parties that when judgment is entered in a certain cause pending in another county, and a transcript thereof forwarded to the district court of defendant's county, where other causes involving the same question are pending, the judge of the latter court may order similar judgments in the other causes, is valid, and the judgments may be entered in vacation.⁷ Where issues are sent from one court to another to be tried, it

³See *infra*, § 448.

⁴*Isler v. Brown*, 67 N. Car. 175.

⁵*Mace v. Gaddis*, 8 Wash. Ter. 125, 18 Pac. Rep. 545.

⁶*State v. Railroad*, 16 Fla. 708.

⁷*Western Land Co. v. English*, (Iowa), 39 N. W. Rep. 719. So of an agreement of parties that a case shall be heard before a judge at chambers in the same

manner and with the same effect as though it were tried by him in court without a jury. *Beach v. Beckwith*, 18 Wis. 21. So of an agreement to refer a pending suit to an arbitrator, and that a judgment in the cause shall be entered according to his decision. *Bank of Monroe v. Widner*, 11 Paige, 529, 43 Am. Dec. 768.

belongs to the court in which the main litigation is pending to enter any judgment that may be necessary in the case. Thus, where issues are sent by the probate court to a court of law, a judgment for costs should be entered by the former court upon receiving the certificate of the verdict, and not by the court in which the issues were tried.⁸

§ 108. Application and Order for Judgment.

Where judgment follows as the result of contested proceedings and the finding of a verdict, it is usually not necessary for the successful party, in modern practice, to take active measures to secure the rendition of judgment. But an application for judgment is in some instances required by statute, and is probably always necessary in case of default. It is held that a judgment which has been entered, and to which the judgment creditor was clearly entitled upon the pleadings, will not be disturbed for failure to give notice of the application for the judgment, or for failure of the clerk to enter in his minutes, as required by the court rules, a statement of the application.⁹ When the court gives to the clerk an order for a judgment, that is his authority for entering the same, and by that alone he must be guided. Hence a judgment entered by the clerk in pursuance of an express order of the court, will not be void and a mere nullity, although the court, by a subsequent order not noticed by the clerk, have directed the case to be continued, although such a judgment would be irregular and voidable, and liable to be set aside upon seasonable application to the court.¹⁰

§ 109. Signature of Judge.

The impression not uncommonly prevails that at common law a judgment required the signature of the court in order to be valid. This notion—arising probably from an ambiguous use of the phrase “signing judgment”—is erroneous; and the ancient practice furnishes but

⁸ *Levy v. Levy*, 28 Md. 25; *Browne v. Browne*, 23 Md. 103.

⁹ *Pormann v. Frede*, 72 Wis. 226, 39 N. W. Rep. 385. See, as to defective

notice of a motion for a judgment, *White v. Sydenstricker*, 6 W. Va. 46.

¹⁰ *Claggett v. Simes*, 31 N. H. 56.

slight aid in determining the same question in modern law.¹¹ Now in some of the states the statutes require that the judgment itself, or the record in which it is entered up, shall be signed by the judge; and in these states some of the decisions hold that unless this direction is complied with, the judgment will be entirely invalid and of no force or effect.¹² Still, these statutes require the signature only of final and definite judgments which pass upon the merits of a controversy and may constitute *res judicata*; interlocutory orders, made in the progress of a cause, have their effect without being signed by the judge.¹³ And some of the authorities show a tendency to construe

¹¹French v. Pease, 10 Kans. 51, 55, Valentine, J.: "It is claimed that at common law judgments were not valid unless they were signed, and authorities are cited to show the same. 'Signing judgment,' however, at common law, did not mean such a signing of judgments as we have been considering [i. e., signing them by the judge on the record]. None of the authorities cited by counsel for plaintiff in error show that a complete judgment-entry after it was made needed to be signed, or that it would be invalid if not signed. The words 'signing judgment' and other similar words, as used at common law, meant a very different thing from signing the completed judgment-entry. Such words simply meant the allowance or permission by the master, prothonotary, or other proper officer, to the plaintiff or defendant, to have judgment entered in his favor when the cause had reached such a stage that he was entitled to have a judgment rendered in his favor. Bouvier, Law Dict. tit. *Signing Judgment*; also, tit. *Postea*; 8 Bouvier's Inst. 531, No. 3313, § 6. And the common law authorities nearly always speak of one of the *parties*, generally the plaintiff, 'signing judgment,' and seldom speak of an officer 'signing judgment.' Jacob, Law Dict. tit. *Judgment*; 2 Tidd's Prac. 465, 469, 908. And the judgment here spoken of as thus

'signed' is in fact no judgment at all. It is not a completed judgment. It has not yet been entered in full. It has not yet become a part of the permanent rolls of the court. It is really only a right and a permission to take judgment, and although an execution may in some cases be issued on it, yet it cannot be used as evidence in any court of justice. Bouvier, Law Dict. tit. *Judgment*; 2 Phillips, Ev. 184. It has been held in Pennsylvania that the full or completed judgment may not be made up for years after it is allowed, and then that it may be made up from the skeleton entries on the docket and trial list. Wilkins v. Anderson, 11 Pa. St. 399. Now if this is good law, it would not seem necessary that the judge should sign the completed judgment when it is made up."

¹²Succession of Ashbridge, 1 La. Ann. 206; Hatch v. Arnault, 3 La. Ann. 482; Saloy v. Collins, 30 La. Ann. 68; State v. Jumel, 30 La. Ann. 421; Sloan v. Cooper, 54 Ga. 486; Raymond v. Smith, 1 Met. (Ky.) 65; Galbraith v. Sidener, 28 Ind. 142. Until a judgment is signed by the judge, it cannot acquire a lien, although recorded. Marchal v. Hooker, 27 La. Ann. 454.

¹³Wickham v. Nalty (La.), 6 South. Rep. 123; State v. Judge of Fifth District, 12 La. Ann. 455.

such statutes in a liberal manner, instead of requiring an exact compliance with their terms. Thus a judgment which the court was competent to render without the verdict of a jury will be upheld if found entered on the minutes of the day's proceedings, the minutes of the day being regularly signed by the judge, though the judgment itself bears only the signature of counsel. Such a judgment, it is said, is irregular but not void, and can be amended.¹⁴ So the signature of the judge affixed by consent in vacation is a sufficient authentication of a decree in an ordinary action to authorize an execution.¹⁵ Another group of cases goes much further than this, and holds that the requirement that a judge shall sign all judgments rendered in his court is merely *directory*, and consequently that his omission to do so will not avoid the judgment as to strangers, although it might, in connection with other evidence, be a proof that the judgment was fraudulent or had not been in fact rendered by him.¹⁶ In several of the other states, there being no statutory requirement of this character, it is held to be entirely unnecessary to the validity of a judgment that it be signed by the judge; the presumption is, that if it is entered by the clerk, it was so directed and authorized by the court.¹⁷ And a valid judgment will support an execution issued in conformity therewith, although the formal record evidence of its rendition may not have been in existence at the time execution issued.¹⁸ In New York it is said: "There is no provision of the present law requiring such signing. The judge is to make his 'decision in writing,' and this, it is presumed, he must sign by way of authentication. The judgment

¹⁴ *Tharpe v. Crumpler*, 63 Ga. 278; *Huckaby v. Sasser*, 69 Ga. 608. A judgment signed "by the court, H., plaintiff's attorney," which was put on the minutes, signed by the judge, was held valid in *Jones v. Word*, 61 Ga. 28.

¹⁵ *Rust v. Faust*, 15 La. Ann. 477.

¹⁶ *Rollins v. Henry*, 78 N. Car. 342; *Keener v. Goodson*, 89 N. Car. 278; *Bartlett v. Lang*, 2 Ala. 161; *Cannon v. Hemphill*, 7 Tex. 184; *Cathcart v. Peck*, 11 Minn. 45, (Gil. 24;); *Childs v. McCheyney*, 20 Iowa, 481, 89 Am. Dec. 545. The omission of the judge to

sign the record at the close of the term will not invalidate judgments or decrees of the term, although such omission would be gross neglect. *Matter of Slocomb*, 9 Ark. 375.

¹⁷ *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 7 Pac. Rep. 123; *Cathcart v. Peck*, 11 Minn. 45, (Gil. 24;); *Fontaine v. Hudson*, 98 Mo. 62, 5 S. W. Rep. 692; *Platte County v. Marshall*, 10 Mo. 345.

¹⁸ *Fontaine v. Hudson*, *supra*. And see *Los Angeles County Bank v. Raynor*, 61 Cal. 145.

itself is to be entered in the judgment-book, and is in theory entered by the clerk."¹⁹ The practice in Kansas is thus described:—the clerk by order or permission of the court enters the judgment in all cases in full upon the journal, and this judgment (as well as every other proceeding) is valid, and has force and effect, as soon as it is entered on the journal, whether it is ever signed by the judge or not, and whether it is ever transcribed into the complete record or not.²⁰ And it is believed that a practice more or less closely analogous to this is in vogue in a majority of the states; so that only in a few jurisdictions can the judge's signature be regarded as an indispensable requisite to the validity of the judgment.

§ 110. Entry by the Clerk.

When a judgment has been rendered in a cause, it becomes the duty of the clerk, according to the usual practice, to make a record entry of it in an official book kept for that purpose. In some states, he is required, at this stage, to make up a complete record of the case from its inception to its close, or a "judgment-roll;" in others, he merely adds an entry of the judgment to the brief history of the case contained in his docket and which consists of consecutive statements of the steps taken in the cause from the issue of the writ on. The object of this entry is to furnish an enduring memorial and incontestable evidence of the judgment, and to fix its date for purposes of appeal or creating a lien. But, as was stated in the beginning of this chapter, this proceeding is ministerial only, and is not essential to the validity of the judgment itself. It is none the less the judgment of the court because not entered by the clerk. And, except for certain special purposes, it does not remain inchoate or unfinished until so entered. Hence the neglect or failure of the clerk to make a proper entry of record of the judgment, or his defective or inaccurate entry of it, will not, as between the parties, operate to invalidate the judgment.²¹ "The fact that the clerk did not perform his entire duty

¹⁹ *De Laney v. Blizzard*, 7 Hun, 66.

²⁰ *French v. Pease*, 10 Kans. 51.

²¹ *Craig v. Alcorn*, 46 Iowa, 560;

Bridges v. Thomas, 50 Ga. 378. Omission to properly record the verdict is a mere irregularity which does not de-

in making up the record cannot deprive parties of their rights. Even although he should entirely fail to make up a record, such neglect would not affect those interested in the matter decided, if sufficient could be found upon the files and books of the court to show what had been done. What we call the complete record of a case is nothing but the history of what has been done in the case, copied by the clerk into a book called the book of records. It is not the writing of those things in this book that gives them validity. It is the previous action of the court upon the subject-matter. The record is but evidence of this action, and if, in copying, the clerk makes a mistake, that mistake will be corrected by entries made from time to time of the action of the court, and which entries, made in other books of the court, lay the foundation for the complete records."²² The *docket* of a judgment, it is held in New York, is no part of the record of the court; the entries upon the docket are directed to be made by the clerk, who, in making them, acts in a ministerial capacity, and his erroneous or false entries cannot conclude the parties, whatever might be the effect of an entry which he was authorized by law to make.²³ In some of the states it is required by law that, before a docket entry is made of a judgment, there shall be filed a "judgment-roll" containing all the papers necessary to be attached according to the provisions of the statute. It appears that unless this provision is complied with, the docketing of the judgment is an unauthorized and illegal act.²⁴ But it is also held that an order denying a motion to set aside a judgment because of the failure to file a proper judgment-roll is not reviewable in the appellate court. If what was done amounts to a legal nullity, no substantial rights of the defendant are impaired

stroy the validity of the judgment, at least until it be set aside. *Gunn v. Plant*, 94 U. S. 664. An entry by the prothonotary, on his docket, of a suit, and that a judgment-bond was filed of record therein, stating the particulars of it and the date of entry, was held a good entry of judgment under the Penna. Act of Feb. 24, 1806. *Helvete v. Rapp*, 7 Serg. & R. 306.

²² *Newnam's Lessee v. Cincinnati*, 18 Ohio, 323, 331, *Hitchcock*, C. J.

²³ *Booth v. Farmers' Bank*, 4 Lana. 301. If the mistakes or defects in docketing the judgment do not impair the substantial accuracy and fulness of the record required, as notice to persons interested, they will not prevent the judgment from becoming a lien. *Hesse v. Mann*, 40 Wis. 560.

²⁴ *Townshend v. Wesson*, 4 Duer, 342.

by the denial; and if the roll is not in due form, or the filing for any reason is irregular, the granting or refusing the application is discretionary.²⁵ According to the law and practice obtaining in other states, to constitute a judgment for the purpose of docketing, it must first be entered in the "judgment-book." And a docketing without such entry is of no avail, even though a judgment-roll be filed with what purports to be a copy of a judgment in it.²⁶

The general principle pointed out in this chapter—that an unrecorded judgment is valid between the parties, though it may not be notice to strangers—is illustrated by an Alabama decision, in which it is held that a statute which requires decrees of the chancery court vesting the title to property in either of the parties to a suit, to be recorded in the office of the clerk of the county in which the land is situated, does not make the vesting of the title dependent on the recording of the decree, but the decree is affected by a failure to have it so recorded just as a deed would be under the registration laws.²⁷ That a judgment duly entered in the judgment-book was not *signed* by the clerk is an irregularity and a deviation from the ordinary practice, but it does not vitiate the judgment as to third persons in collateral proceedings.²⁸

§ 111. Entry in wrong Book.

When the clerk is directed by law to keep certain books for the entry of judgments, or to record judgments in a book specially designated by statute for that purpose, and deviates from the course prescribed, then in either case, for reasons sufficiently stated in the preceding section, the validity of the judgment is not thereby impaired as between the parties.²⁹ As concerns third persons the case might

²⁵ *Whitney v. Townsend*, 67 N. Y. 40. And see *Hardin v. Melton*, 28 S. Car. 83, 4 S. E. Rep. 805.

²⁶ *Rockwood v. Davenport*, 87 Minn. 533, 35 N. W. Rep. 377.

²⁷ *Witter v. Dudley*, 43 Ala. 616. There are some cases which seem to indicate that confessed judgments are regarded as an exception to the general principle above stated. But this

is too much a matter of statutory regulation to be here discussed in detail. See *King v. French*, 2 Sawyer, 441; *Johns v. Fritchey*, 39 Md. 258.

²⁸ *Artisans' Bank v. Treadwell*, 34 Barb. 553; *Hotchkiss v. Cutting*, 14 Minn. 542, (Gil. 408); *Jorgensen v. Griffin*, 14 Minn. 466, (Gil. 346.)

²⁹ In Minnesota, notwithstanding the adoption of a code of procedure merg-

be different. Probably one would not be bound by notice of a judgment which did not appear in the book designated by law as the proper quarter in which to direct his inquiries, although it might be recorded in a book regularly kept by the clerk but not recognized by law.²⁰ Still, this would not impair the right to issue execution. So, under the laws of Maryland, the entry of judgment in the "permanent judgment-record" in the first instance, and without any previous entry thereof in the "trial-docket," as required by the ordinary practice of the trial courts, does not render the judgment illegal or so irregular as to require it to be stricken out.²¹

§ 112. Indexing the Judgment.

In some of the states, the *index* to the record of judgments is made, by the effect of the statute, a part of the record; and a judgment is not a lien on real property until properly indexed, as against a purchaser who has searched the index with due care; and third persons cannot be charged with constructive notice of a judgment unless the same is correctly indexed.²² In Virginia, however, an exactly opposite doctrine prevails; the index is no part of the record and is not essential to the creation of a valid lien.²³ We shall return to this subject in a later chapter.²⁴

§ 113. Remedy against Clerk for improper Entry.

There is no question that the owner of a judgment may maintain an action for damages against the clerk of the court for neglecting to

ing legal and equitable forms in one form of action and providing only for a "judgment" as the determination of issues, the clerk of a certain court kept two books, one labelled "judgment-book," the other "decree-book," and was accustomed to enter causes of legal cognizance in the former, and equity causes in the latter. *Held*, that a judgment of foreclosure was not impaired by the fact that it was entered in the "decree-book" only. The error in the label was a mere irregularity, which could not affect the rights of

parties. *Thompson v. Bickford*, 19 Minn. 17, (Gil. 1.) See *Lentilhon v. New York*, 8 Sandf. 731.

²⁰ See *Hesse v. Mann*, 40 Wis. 500. See *infra*, §§ 404-406.

²¹ *Bond v. Citizens' Nat. Bank*, 65 Md. 498, 4 Atl. Rep. 893.

²² *Metz v. State Bank*, 7 Nebr. 165; *Sterling Manuf. Co. v. Early*, 69 Iowa, 94, 28 N. W. Rep. 458.

²³ *Old Dominion Co. v. Clarke*, 28 Gratt. 617.

²⁴ See *infra*, § 406.

make a proper entry of it, provided he shows an absolute loss of his judgment in consequence of such neglect.³⁵ And the rule that it is the duty of the creditor to see that his judgment is properly entered applies only as between the parties and those affected by the want of constructive notice, but has no reference to the question of the liability of the clerk to the plaintiff whose judgment was wrongly entered.³⁶

§ 114. Contents of the Judgment.

No particular form of words is usually considered necessary to show the rendition of a judgment. The record of the judgment is sufficient if the time, place, parties, matter in dispute, and the result, with the relief granted, are clearly stated.³⁷ So, under the ordinary practice, it is not required to set out in the judgment itself the facts on which it is founded; it is sufficient if they are stated in the pleadings and ascertained by the judgment.³⁸ And under those systems of practice which assimilate the legal and equitable jurisdiction, it is not necessary that the facts on which a decree in equity is based should be recited therein. The case is preserved in the same manner as in an action at law, and all the material evidence must be incorporated in the bill of exceptions.³⁹ But it is held that a judgment of conviction should contain the facts judicially ascertained, together with the manner of ascertaining them, and the recorded declaration of the court pronouncing the legal consequences of those facts.⁴⁰

§ 115. Form of the Judgment.

"The judgment is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out, and therefore the style of the judgment

³⁵Blossom v. Barry, 1 Lans. 190.

³⁶Saylor v. Commonwealth (Pa.), 5 Atl. Rep. 237; Coyne v. Souther, 61 Pa. St. 455.

³⁷Barrett v. Garragan, 16 Iowa, 47; Church v. Crossman, 41 Iowa, 373; Ordinary v. McClure, 1 Bailey, 7.

³⁸Hamilton v. Ward, 4 Tex. 356.

³⁹Judge v. Booge, 47 Mo. 544. But in Illinois it is considered the proper practice to preserve the evidence by recitals in the decree. Walker v. Carey, 53 Ill. 470.

⁴⁰Mayfield v. State, 40 Tex. 289.

is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own, but 'it is considered,' *consideratum est per curiam*, that the plaintiff do recover his debt, his damages, his possession, and the like; which implies that the judgment is none of their own, but the act of law, pronounced and declared by the court, after due deliberation and inquiry."⁴¹ This being the theory and practice of the common law, there was at one time a disposition on the part of some of our courts to be very strict in requiring the use of this exact formula, and to hold that nothing could be substituted for the word "considered" without fatal consequences.⁴² But a more liberal view now obtains, and the cases hold that the terms "decreed," "resolved," "ordered," "judgment rendered," etc., are fully equivalent to the original technical term, provided the entry shows an actual giving of judgment and exhibits what it is required to specify with clearness and precision.⁴³ It may therefore be stated as the modern rule that the *form* of the judgment is not very material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated.⁴⁴ In other words, the sufficiency of the writing claimed to be a judgment should always be tested by its substance rather than its form.⁴⁵ But while this is so, there are certain requisites of a judgment which cannot be dispensed with. In the first place, the entry must purport to be an actual judgment, conveying the sentence of the law, as distinguished from a mere memorandum, note, or recital that a judgment had been or would be rendered. In a case where the

⁴¹ 8 Bl. Comm. 896.

⁴² Baker v. State, 8 Ark. 491.

⁴³ Johnson v. Gillett, 53 Ill. 360; Deadrick v. Harrington, 1 Hemp. 50; Minkhart v. Hankler, 19 Ill. 47; Taylor v. Runyan, 3 Clarke (Iowa), 474. On a verdict for the defendant in the county court, judgment was rendered as follows: "I hereby render judgment against plaintiffs for costs herein. Judgment rendered against plaintiffs for costs;" *held*, that the judgment, though informal and incomplete, was

not void. Marsh v. Snyder, 14 Nebr. 8, 14 N. W. Rep. 804. In Pennsylvania, the entry "judgment on verdict" may, in a *scd. fa.* upon it, be considered as the judgment which the plaintiff was entitled to have. Shirtz v. Shirtz, 5 Watts, 255.

⁴⁴ Scott v. Burton, 6 Tex. 323, 55 Am. Dec. 782; Hamman v. Lewis, 84 Tex. 474.

⁴⁵ Humboldt Mill Co. v. Terry, 11 Nevada, 287.

record stated as follows: "This cause coming on to be heard on the demurrer to the plaintiff's petition heretofore filed, the court, after hearing the argument of counsel thereon, and after due consideration, sustained said demurrer and rendered judgment for the defendant and against the plaintiff for the costs of this action taxed at \$11.20," it was held that this was no judgment, but a mere recital that one had been rendered for costs.⁴⁶ In the next place, a true judgment must be distinguished from a mere order, or direction, or permission to the clerk to enter a judgment. A document of the latter kind has not the force or the characteristics of a judgment, and will not support an execution.⁴⁷ It is further to be noted, in connection with matters of form in judgments, that a much less degree of technicality and formality is required in the judgments of justices of the peace and other inferior courts, than is exacted in respect to the judgments of courts of record. In the case of judgments of the former order, it is generally held sufficient if the books and papers disclose with reasonable certainty that a judgment was in fact rendered for one of the parties, and for what amount, or even that a verdict was returned on which no judgment was actually entered.⁴⁸ It is also to be remarked that irregularities and defects of form, in judicial proceedings, can be taken advantage of by parties and privies only; third persons have no right to interfere.⁴⁹

⁴⁶Miller v. B. & M. R. Co., 7 Nebr. 227. An entry thus:—"Judgment accordingly taxing all costs against def't," is not a judgment. Roberts v. State, 8 Tex. App. 47. An entry of judgment as follows: "Whereupon the court enters judgment upon the finding," is insufficient. Faulk v. Kellums, 54 Ill. 188.

⁴⁷The following entry in the minutes of a court, "verdict for plaintiff, let writ issue," is not a judgment, and execution thereon is void. Stark v. Billings, 15 Fla. 818. But where the record in a cause, after reciting the trial and verdict, proceeded: "There-

fore it is considered and adjudged by the court that the plaintiff in this action have judgment" etc., held, that this was a judgment and not merely an order for judgment, and the court did not err in refusing to set aside the docketing thereof, and subsequent proceedings thereon, on the ground that there was no judgment. Potter v. Eaton, 26 Wis. 382.

⁴⁸Elliott v. Jordan, 7 Baxt. 376; Gaines v. Betts, 2 Dougl. (Mich.) 98; Overall v. Pero, 7 Mich. 315; Lynch v. Kelly, 41 Cal. 232; Felter v. Mulliner, 2 Johns. 181.

⁴⁹Breading v. Boggs, 20 Pa. St. 38.

§ 116. Designation of the Parties.

"To constitute a valid judgment, the record of it must contain sufficient certainty and precision to enable the clerk to issue an execution by inspection of the entry, without reference to other entries." In the case from which this quotation is taken, the judgment was against "the Captain and Master of the Steamboat Mollie Hamilton," and there was nothing in the record to disclose the *name* of the captain or master. It was accordingly held that the judgment was void.⁵⁰ The decision was undoubtedly correct on the facts of the case, but the general rule announced must not be understood as declaring that the judgment itself cannot be aided in this respect by reference to other parts of the *same record*. For numerous authorities hold that a judgment expressed to be merely for or against the "plaintiff" or the "defendant" will be sufficient, if the names of the parties thus designated can be ascertained without ambiguity from other parts of the record.⁵¹ So in a case where, although the complaint states no cause of action against any but the defendant, a third person is permitted on his own petition to appear and answer, and a verdict is found against "the defendant," the use of the plural "defendants" in the judgment will be treated as a merely clerical error, and the judgment be held as one against the original defendant only.⁵² So a judgment for a definite amount should not be set aside because it fails to state that it is for the plaintiff against the defendant, where the declaration sets forth a cause of action and the parties thereto.⁵³ Nevertheless, a *patent ambiguity* on the face of the judgment cannot be thus cured or aided. In an Ohio decision the court said: "The order of the court was that these instalments should be paid by the parties in partition 'or their representatives or assigns,' and in default that execution should issue therefor. This order is void for

⁵⁰ Captain of Steamer Mollie Hamilton v. Paschal, 9 Heisk. 203.

⁵¹ Aldrich v. Maitland, 4 Mich. 205; Smith v. Chenault, 48 Tex. 455; Little v. Birdwell, 27 Tex. 688; Collins v. Hyslop, 11 Ala. 508; Wilson v. Nance, 11 Humph. 189.

⁵² Taylor v. Taylor, 64 Ind. 356. See also Holcomb v. Tift, 54 Mich. 647, 20 N. W. Rep. 637; Finnagan v. Manchester, 12 Iowa, 521.

⁵³ Adams v. Walker, 59 Ga. 506.

uncertainty. A judgment against A. or B. is no valid judgment against either A. or B., and is simply void."⁵⁴ On the other hand, in a suit to enforce a resulting trust on payment of money due the holders of the legal title, a decree requiring such holders to convey to "the heirs at law of W. B." is proper, without requiring that the persons intended be individually named.⁵⁵ So a judgment rendered against a defendant omitting his Christian name cannot be considered void, but an action may be maintained against him on such judgment, averring his identity, and the plaintiff may prove by parol that he is the person against whom the judgment was rendered.⁵⁶ It is sufficient if the memorandum of the style of a cause, made by the clerk, indicate with reasonable certainty to what suit it relates. The description of the parties by the name of their firm is sufficient, and a judgment in favor of the plaintiffs against the defendants is sufficient, as the pleadings show who they are.⁵⁷ In Ohio it is required by statute that the judgment shall certify which of the defendants is principal and which surety; but this, it is held, only applies where they are sued jointly, and if judgment is recovered in an action against the surety alone, it is not necessary to its validity that it should specify the fact of his suretyship.⁵⁸ The title of a case is matter of form only, and a clerical error therein will not vitiate.⁵⁹

§ 117. Designation of the Property.

When a judgment has to do with specific property, it is essential that the property be designated in the judgment with such a degree of certainty that it can be identified without reasonable opportunity for mistake. Thus a decree for the distribution of an estate should

⁵⁴ *Miller v. Peters*, 25 Ohio St. 270.

⁵⁵ *Low v. Graff*, 80 Ill. 360.

⁵⁶ *Newcomb v. Peck*, 17 Vt. 303, 44 Am. Dec. 340; *Root v. Fellowes*, 6 Cush. 29. The mere entry upon the judgment docket of a judgment against E. A. Swift, when defendant's name was A. E. Swift, would not invalidate the whole proceeding, if the judgment upon the court's record was duly en-

tered against A. E. Swift, and in the absence of proof to the contrary, it will be presumed that it was so duly entered. *Preston v. Wright*, 60 Iowa, 351, 14 N. W. Rep. 352.

⁵⁷ *Collins v. Hyslop*, 11 Ala. 508.

⁵⁸ *Wilkins v. Ohio Nat. Bank*, 81 Ohio St. 565.

⁵⁹ *Ewing v. Hatfield*, 17 Ind. 518.

set out specifically the property to be distributed.⁶⁰ So a judgment of recovery in trespass to try title is void if it does not describe the land with sufficient certainty to identify it.⁶¹ But because there is a want of certainty in the description of land ordered to be sold to satisfy a judgment, it does not follow that the judgment is otherwise bad. Though such want of certainty renders void what it refers to, unless the plaintiff in the execution be dissatisfied no other person has cause of complaint.⁶² But here also, as in respect to the designation of the parties, the judgment may be aided by intendments and additional data drawn from the pleadings and other parts of the record. Thus a decree is not void, nor incompetent as evidence, because it contains no description of the land thereby decreed to be conveyed, if it refers to the petition in the action, for such description, in apt and sufficient words.⁶³ Indeed the authorities go even further than this. For it has been held that a judgment that plaintiff recover "the property in controversy," or in default thereof a sum fixed as its value, will not be reversed for uncertainty in the recovery, where, although the petition claims several articles, the record shows that the controversy was reduced to two of them.⁶⁴

§ 118. Designation of Amount of Recovery.

The amount of a judgment must be stated in it with certainty and precision. All judgments must be specific and certain; they must determine the rights recovered or the penalties imposed, and be such as the defendant may readily understand and be capable of performing.⁶⁵ A judgment, it is said, must be so certain that the clerk can issue an execution by inspection of it, without reference to other entries.⁶⁶ Hence a judgment which is uncertain as to the amount which it awards is invalid.⁶⁷ For example, a judgment against a garnishee "for the amount of his answer or so much thereof as will

⁶⁰ Jones v. Minogue, 29 Ark. 687.

⁶¹ Hearne v. Erhard, 33 Tex. 60.

⁶² Gear v. Hart, 81 Tex. 185.

⁶³ Foster v. Bowman, 55 Iowa, 287, 7 N. W. Rep. 518. See also Jones v. Belt, 2 Gill, 106.

⁶⁴ Coleman v. Reel (Iowa), 39 N. W. Rep. 510.

⁶⁵ People v. Pirfenbrink, 96 Ill. 68.

⁶⁶ Boyken v. State, 3 Yerg. 493.

⁶⁷ Jones v. Acre, Minor, 5.

satisfy the plaintiff's debt and costs" has been held void for uncertainty.⁶⁶ And a finding that a garnishee was liable for one of two amounts, which are to be determined by a future contingency, was not considered a judgment at all.⁶⁷

Nevertheless, *id certum est quod certum reddi potest*; and we are unable to discover any good reason why this maxim should not apply to the amount of a judgment as well as in any other case. An obscure or ambiguous designation of the parties or the subject-matter involved may be construed, as we have seen, with reference to the other parts of the record. And if the pleadings, or the verdict, show the actual amount of the recovery, without any doubt or room for mistake, it would seem that the judgment should not be considered invalid, at least as between the parties, for its failure to specify the sum awarded with precision. It must be admitted that the authorities hardly go to the length of sanctioning the rule here suggested, although the general principle of construing a judgment by the record is not disputed. But the cases certainly justify the statement that if the judgment-entry itself, without naming the amount of recovery, contains data which permit its calculation, a sufficient degree of certainty is attained. Thus a judgment for interest from a day mentioned is sufficiently certain without fixing the amount.⁶⁸ So also, if a verdict be found for a fixed and definite amount, and the judgment refers to the verdict in explicit terms (as if it is expressed to be "for the said sum assessed as aforesaid"), it is considered to be sufficiently precise.⁶⁹ But it is error to render judgment on a verdict for the plaintiff which fails to state how much

⁶⁶Berry v. Anderson, 2 How. (Miss.) 649.

⁶⁷Battell v. Lowery, 46 Iowa, 49. See Early v. Moore, 4 Munf. 262. An entry, upon the rendition of a verdict for plaintiff, that "defendant is entitled to a credit to be ascertained by A. and B., and the clerk is then authorized to enter a *remittitur*, judgment of the court accordingly and for costs," is not a judgment then rendered, but an agreement for a judgment to be rendered subsequently, upon the ascertainment

by the referees of the credit to which the defendant is entitled. McIlvaine v. Batchelor, 8 Dev. & B. 52.

⁶⁸Dinsmore v. Austill, Minor, 89.

⁶⁹Ellis v. Dunn, 3 Ala. 632. A justice's judgment "that the plaintiff recover the sum as claimed in the above case," will be sustained, notwithstanding its informality, when the record shows that the action was *assumpsit* for \$81, and defendant appeared and contested the claim. Ladnier v. Ladnier, 64 Miss. 368, 1 South. Rep. 492. On

he should recover, when all debt is denied by the defendant. In such case the jury should have been requested to retire and find how much the plaintiff ought to recover.⁷³

If there are *blanks* in the judgment, instead of a statement of its amount, this will destroy its force and effect for most purposes, or at least leave it incomplete until the blanks are filled. For instance, a judgment that the party recover "costs of suit taxed at —," the amount of costs not being inserted in the record, will not support a declaration upon the judgment as for a fixed sum, nor can the defect in the record be supplied by resorting to an entry upon the clerk's docket.⁷⁴ So a confession of judgment for "— dollars," and so entered, creates no lien on the property of the judgment debtor while it remains in that condition.⁷⁵ In Pennsylvania, however, it appears to be the rule that a judgment entered for an unliquidated sum will sustain an execution and a sheriff's sale thereon, if the actual amount of the judgment-debt be indorsed on the execution.⁷⁶ When the clerk enters a judgment, leaving blanks for the amount of damages and costs, the case being one where such amount can be ascertained by mere calculation, the court has power to order the blanks to be filled up at the next term, the clerk having died during the session;⁷⁷ or if the clerk himself fills up the blanks, after the lapse of more than a year from the judgment, his doing so will not invalidate the judgment so far as to expose it to collateral impeachment, although it may be ground for a writ of error.⁷⁸ Another question arises in the case of a judgment where a blank is left for the *costs* alone. Undoubtedly the judgment is not perfect until this blank is filled. But it is held that the record of a judgment which is regular in all respects,

overruling a frivolous demurrer to a complaint for a specific sum for goods sold and delivered, and no answer over, judgment for the sum claimed is proper, without taking proof of the amount of damages. *Adrian v. Jackson*, 75 N. Car. 536.

⁷³ *Bartle v. Plane*, 68 Iowa, 227, 26 N. W. Rep. 88.

⁷⁴ *Noyes v. Newmarch*, 1 Allen, 51.

⁷⁵ *Lea v. Yeates*, 40 Ga. 56. The judg-

ment record in a case left the amount of the judgment blank, except as to \$4.95 costs. In the docket it was entered as \$265 damages and \$16.95 costs with 10 per cent. interest. *Held*, good as a judgment for \$4.95 only. *Case v. Plato*, 54 Iowa, 64, 6 N. W. Rep. 128.

⁷⁶ See *Ullahafer v. Stewart*, 71 Pa. St. 170; *Gray v. Coulter*, 4 Pa. St. 188.

⁷⁷ *Hagler v. Mercer*, 6 Fla. 721.

⁷⁸ *Lind v. Adams*, 10 Iowa, 898.

except that the costs are left blank until they are taxed by the court, and then inserted, is admissible in evidence in an action of debt on that judgment.⁷⁸ A distinction is taken, in one of the recent cases, which we believe to be well founded. It is held that as respects the lien or the validity of a judgment informally entered and docketed without the taxation and insertion of costs therein, the omission is to be treated as a mere irregularity; but for the purposes of an appeal, the prevailing party, seeking to limit the rights of his adversary, is to be held to strict practice, and the judgment is not to be deemed perfected until the costs to which he is entitled are duly taxed and inserted in the judgment.⁷⁹

All judgments rendered in this country should be expressed in the American denominations of money. A judgment given by the court for a certain amount in francs is therefore erroneous, and will be amended on appeal so as to express the amount in dollars and cents.⁸⁰ It has sometimes been made a question whether the statement of the amount of a judgment in figures merely, instead of the sum being written out, would impair its validity. There are cases which hold a judgment so expressed to be defective to the point of invalidity.⁸¹ Other authorities seem reluctant to admit that this alone would absolutely avoid the judgment so as to render it open to collateral attack.⁸² While the practice is undoubtedly loose and irregular, it is difficult to see in it any sufficient ground for considering the judgment entirely void. If the amount of recovery stated in figures in a judgment differs from that stated in writing, but the recitals in the judgment itself show the former to be the true amount, the error is not sufficient cause for the reversal of the judgment.⁸³ If the amount of the judgment is written out, the designation "dollars" (or "cents," or both, as the case may be) must be appended to it.

⁷⁸ *Calhoun v. Terry Porter Co.*, 21 Conn. 526. In California, the clerk has no right to insert costs after the judgment is entered and the record completed. The remedy in such case is by a motion to the court for amendment. *Chapin v. Broder*, 16 Cal. 403.

⁷⁹ *Richardson v. Rogers*, 37 Minn. 461, 35 N. W. Rep. 370.

⁸⁰ *Erlange v. Avegno*, 24 La. Ann. 77.

⁸¹ *Smith v. Miller*, 8 N. J. Law, 175, 14 Am. Dec. 418; *Linder v. Monroe*, 83 Ill. 390.

⁸² *Fullerton v. Kelliher*, 48 Mo. 542.

⁸³ *Cave v. Houston*, 65 Tex. 619.

Thus a judgment for "four hundred and sixty-one and 53-100 damages" is not for any sum of money and is therefore a nullity.⁵⁴ But it has also been held, and by a very high authority, that the omission of the word "dollars" in a verdict for the plaintiff in an action of *assumpsit* does not affect the validity of a judgment entered thereon according to the manifest intent of the jury.⁵⁵ If the amount of the judgment is expressed in figures, the dollar-mark, or some other appropriate sign must be used to show the sum intended. The necessity for a statement of this kind arises from the loose manner of keeping the records of tax-judgments which formerly prevailed in some of the states, and was often brought to the notice of the courts. The rule is that a judgment for taxes is fatally defective if it does not show the amount of the tax for which it was rendered; and the use of numerals simply, without any words, marks, or signs to indicate that they stand for money, and for what denominations of money, is not sufficient.⁵⁶ This rule governs also in case of a judgment for a special assessment.⁵⁷ It may be conceded, however, that the use of the dollar-mark is not indispensable, if the amount can be indicated *with certainty* by any other device or contrivance.⁵⁸

An entry of judgment for the right sum, but inaccurately named "damages" instead of "debt,"—or so much debt and so much dam-

⁵⁴ *Carpenter v. Sherfy*, 71 Ill. 427. The court said: "We have no right to indulge in presumptions as to what was found by the court; we must take the record as it reads. A judgment should be for a certain and definite sum of money."

⁵⁵ *Hopkins v. Orr*, 124 U. S. 510, 8 Sup. Ct. Rep. 590.

⁵⁶ *Woods v. Freeman*, 1 Wall. 398; *Lawrence v. Fast*, 20 Ill. 338, 71 Am. Dec. 274; *Lane v. Bommelmenn*, 31 Ill. 143; *Gibson v. Chicago*, 23 Ill. 573; *Eppinger v. Kirby*, 23 Ill. 521; *Dukes v. Rowley*, 24 Ill. 210; *Bailey v. Doolittle*, 24 Ill. 577; *Potwin v. Oades*, 45 Ill. 367; *People v. Savings Union*, 81 Cal. 135; *Randolph v. Metcalf*, 6 Coldw. 400; *Tidd v. Rines*, 26 Minn. 201, 2 N. W. Rep. 187; *Black, Tax Titles*, § 60.

⁵⁷ *Pittsburgh, F. W. & C. R. Co. v. Chicago*, 53 Ill. 80.

⁵⁸ In the case of *Gutzwiller v. Crowe*, 32 Minn. 70, 19 N. W. Rep. 344, it appeared that, in the entry of a tax-judgment on the official books, there was a column headed "Total amount of judgment," and in this column appeared three Arabic numerals, the first separated from the others by a short perpendicular line; it was held that, in reasonable intendment, this must denote money, and that it was a sufficient designation of the amount of the judgment. This decision was declared to be consistent with *Tidd v. Rines*, 26 Minn. 201, 2 N. W. Rep. 187; because one of the grounds on which that case was ruled was that the figures were not separated by any line or decimal mark.

ages,—is not reversible error.²⁰ And where the record of a judgment does not show of what the judgment was made up, it is competent to show that fact by extraneous evidence.²¹

§ 119. Conditions in Judgment.

"When a judgment is recovered according to the terms and conditions of a written obligation for the payment of money, and those terms and conditions expressly either limit the lien of any judgment which may be recovered upon it, or waive the benefit of all laws exempting property from levy and sale on any execution, or waive the right of inquisition upon the delinquent's real estate, and in the entry of the judgment this is set forth upon the docket, it must be held to be a part of the record of the judgment," and therefore will affect subsequent purchasers.²² But a judgment on an ordinary promissory note, though given for the purchase-money of real estate, should not contain provisions declaring it a lien on such real estate and ordering that the same be sold to satisfy it. It should be an ordinary personal judgment against the defendant, authorizing an ordinary execution to be issued against the property in general of the debtor.²³ In an action of replevin, where the plaintiff obtains possession of the property and retains the same, and is in possession of the property at the time the judgment is rendered, it is neither necessary nor proper to render a judgment in favor of the plaintiff for the value of the property in case a return thereof cannot be had.²⁴ As a general rule, a judgment has properly nothing to do with the means of its enforcement; it merely pronounces the sentence of the law upon the facts ascertained in the case.

²⁰ *Carver v. Adams*, 40 Vt. 553. In a suit for the recovery of land and damages for detention, the judgments for the land and for the rents are as distinct as if separate judgments were rendered in different suits. *Shean v. Cunningham*, 6 Bush, 123.

²¹ *Gilbert v. Earl*, 47 Vt. 9.

²² *Hageman v. Salisbury*, 74 Pa. St. 280. And see *Little v. White*, 8 Ind. 544.

²³ *Greeno v. Barnard*, 18 Kans. 518.

²⁴ *Mills v. Kansas Lumber Co.*, 26 Kans. 574.

§ 120. Joint Defendants.

At the common law, it was an inflexible rule that if an action was brought against two or more defendants jointly, the plaintiff could have judgment only against *all* of them or *none* of them; the single exception being in the case where one of the defendants succeeded in establishing a defense, such as his personal disability, peculiar to himself. If one defendant suffered default, no final judgment could be given against him, as we have already stated,⁹⁴ until the case was disposed of as to the others, and not even then unless the verdict was in the plaintiff's favor. Under this practice, therefore, it was error to give judgment against one of the defendants sued without disposing of the suit as to the other defendant; a final conclusion must be reached as to all of them, one way or the other, at the same time.⁹⁵ But now it is provided by statute in some of the states that "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."⁹⁶ In a case where this law was to be applied, the court said: "As no order was made as to the other defendant, the action is still pending against him, and the court had a right to render a judgment against one, and continue the action as to the other; although no order of continuance seems to have been entered, yet the action stood continued by operation of law."⁹⁷

§ 121. Time of entering Judgment.

By the rule of the common law, if a judgment was not stayed by a motion in arrest, or for a new trial, or other appropriate proceeding, within the first four days of the next term after the trial, it was

⁹⁴ *Supra*, § 82. In an action of trover against two, one of whom is defaulted and the other found guilty by the jury, there is but one assessment of damages and a joint judgment. *Gerrish v. Cummings*, 4 Cush. 391.

⁹⁵ *Johnson v. Vaughan*, 9 B. Mon. 217. See *Creigh v. Hedrick*, 5 W. Va. 140.

⁹⁶ Code N. Y. § 274; Code Wis. § 184; Code of Civ. Prac. Ky. § 370; Code Civ. Proc. Cal. § 578.

⁹⁷ *Patton v. Shanklin*, 14 B. Mon. 15.

then to be entered upon the roll or record. Statutes fixing the time of entering a judgment upon verdict exist in some of the states, and require notice in this connection. Thus the New York Code prescribes the lapse of four days after the verdict before the rendition of judgment; but it is held that judgment may be entered upon the verdict immediately, and relief may be had against the verdict within four days afterward, if there be ground for it, notwithstanding the judgment.⁹⁹ But the case is different under a statute which declares that judgments on the decision of the court may be entered "after the expiration of four days from the filing of the decision and the service upon the attorney of the adverse party of a copy thereof, but not before." Here, it is held, four full calendar days must elapse after the filing of a decision and notice thereof before judgment can be properly entered; and here the rule of interpretation which, in computing time, excludes the first and includes the last day, has no application, the provision being clear and explicit.¹⁰⁰ In Pennsylvania, a law requires¹⁰¹ that judgment shall not be entered on the report of a referee until after the expiration of thirty days. But in a case where the prothonotary entered a judgment on the same day on which the report was filed, it was considered that this should not, on error, be treated as material, where it appeared that exceptions to the report were subsequently filed and acted upon, and no attention paid to the mistake.¹⁰² On the other hand, the California Code provides that "when trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."¹⁰³ But the failure of the clerk to enter judgment within the prescribed time does not, according to the authori-

⁹⁹ *Droz v. Lakey*, 2 Sandf. 681.

¹⁰⁰ *Marvin v. Marvin*, 75 N. Y. 240, construing Code Civ. Proc. N. Y. § 1228. Where a justice of the peace decided a cause before him, and made upon the papers in the suit a memorandum of his judgment within four days after the final submission to him, *held*, that the

judgment was regular and valid, although no entry thereof was made in his docket until after the lapse of four days. *Walrod v. Shuler*, 2 N. Y. 134.

¹⁰¹ Act Penna. May 14, 1874.

¹⁰² *Pittsburgh & C. R. Co. v. Shaw* (Pa.) 14 Atl. Rep. 823.

¹⁰³ Code Civil Proc. Cal. § 664.

ties, affect the validity of the judgment afterwards entered; for the injunction of the statute is merely directory and not mandatory.¹⁰³ And reading this statute in connection with another law, which provides, as a penalty, that the action shall be dismissed when the judgment is not entered within six months after verdict, it is held that the court does not lose jurisdiction of the cause if judgment is entered within six months after the verdict is rendered.¹⁰⁴ In other states it appears to be required that the judgment be entered at the same term at which the verdict is returned. But the cases rule that if this is omitted, it is competent for the court to enter the judgment at a subsequent term, both parties appearing and being heard.¹⁰⁵

Rules of the former class—those requiring a certain time to intervene between verdict and judgment—probably obtain in a majority of the states, either by statute or as the settled practice of the courts. Their design is to afford the parties an opportunity of proceeding against the verdict, either by a motion for judgment *non obstante verdicto*, motion in arrest, or motion for new trial, as the case may be. But since the right of a party to so move will not be prejudiced by a premature entry of judgment,¹⁰⁶ and since the judgment itself can be stayed or set aside as well as the verdict, while, on the other hand, it is the right of the prevailing party to have his rights fixed by a judgment as soon as he is entitled to it, it is conducive to justice not to regard a judgment entered in advance of the time as entirely invalid, but to consider the rule as merely directory.

In some jurisdictions, while judgment may be entered immediately upon the verdict, the court may stay the proceedings for a certain number of days, for the purpose of giving time for a motion for new trial. Where this is done, and judgment is entered up before the expiration of the stay, still it is not void. The judgment is only provisional, and it does not deprive the losing party of the right to so move.¹⁰⁷ And even where it appeared that judgment was entered up

¹⁰³ First Nat. Bank of Oakland v. Wolff (Cal.), 21 Pac. Rep. 551; Bundy v. Maginess (Cal.), 18 Pac. Rep. 668.

¹⁰⁴ Waters v. Dumas, 75 Cal. 568, 17 Pac. Rep. 685.

¹⁰⁵ Shephard v. Brenton, 20 Iowa, 41. And see Murdock v. Ganahl, 47 Mo. 185.

¹⁰⁶ Hartridge v. Wessen, 4 Ga. 101.

¹⁰⁷ Harvey v. McAdams, 33 Mich. 472.

while a motion for a new trial was actually on file, which motion was afterwards overruled, and all the proceedings occurred at the same term of court, it was held that the fact that judgment was so entered was no ground for reversing the decision on the motion.¹⁰⁰

§ 122. Date of the Judgment.

The rule of the common law was, that all judgments were presumed to have been rendered on the first day of the term, unless the contrary appeared. And it is also a part of the English practice to consider all judicial proceedings as taking place at the earliest period of the day on which they are done.¹⁰⁰ It is still the rule, in some of the American states, that all judgments docketed during the term shall be deemed to be docketed on the first day of the term; and this, it is held, makes them relate to the first day even where the judge fails to open court on that day.¹¹⁰ But in some other states, principally in New England, an exactly opposite rule is in force, and a judgment is regarded as rendered on the *last* day of the term, unless the contrary is shown.¹¹¹ But in a majority of the states, a judgment takes effect from the day it is actually rendered or entered. "The term of the court is not with us regarded as one day, and though until the term expires the orders made and judgments rendered are largely under the control of the court, and may be altered, modified, or vacated, yet they have been generally regarded as taking effect from the day on which they were made or rendered, subject to the power of the court, and not from the day the term closes."¹¹²

¹⁰⁰ *Hasted v. Dodge* (Iowa), 35 N. W. Rep. 463.

¹⁰⁰ *Wright v. Mills*, 4 Hurl. & N. 488. In this case, judgment was signed at the opening of the office at its usual hour, eleven a. m., and the defendant died at half past nine a. m. on the same morning. It was *held* that the judgment was regular.

¹¹⁰ *Norwood v. Thorp*, 64 N. Car. 632.

¹¹¹ *Bradish v. State*, 35 Vt. 452; *Herring v. Polley*, 8 Mass. 118; *Chase v. Gilman*, 15 Me. 64; *Goodall v. Harris*,

20 N. H. 368. Accordingly, the time within which a motion for new trial must be made (which is limited to two years) must be computed from the last day of the term. *Bradish v. State*, 35 Vt. 452. Taxation of additional costs incident to a suit, with award of execution therefor, at a term subsequent to that of the recording of the judgment, cannot be considered as making the judgment a judgment of the later term. *Rider v. Alexander*, 1 D. Chip. 274.

¹¹² *Ex parte Dillard*, 68 Ala. 594; Ala-

And the date of a judgment may be fixed by reference to the record of the proceedings in the case.¹¹³ We shall have occasion to discuss this topic more fully in connection with the subject of priority among judgment-liens.¹¹⁴

§ 123. Construction of Ambiguous Judgments.

The rule for the construction of ambiguous judgments is clearly stated by the supreme court of Kansas in the following language: "Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended signification made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms."¹¹⁵ This rule also applies to decrees in equity. The meaning and effect of a decree may, in case of doubt, be ascertained by reference to the bill and other proceedings, particularly when these are referred to in the decree itself.¹¹⁶ And for this purpose, recourse may be had to duly attested stipulations between the parties.¹¹⁷ But where a judgment refers to the findings for certain data, and the findings do not contain the data, but refer again to the pleadings, which are also uncertain, the judgment will be reversed for uncertainty.¹¹⁸ A mistake apparent on the face of a judgment, amounting to an impossibility, will not destroy the judgment, if enough remains, after it is corrected or eliminated, to disclose the actual judgment rendered. Thus, where a judgment entry recites a demurrer (sustained) as having been interposed by the defendant to his own plea, the appellate court will intend the

bama C. & N. Co. v. State, 54 Ala. 36; Quinn v. Wiswall, 7 Ala. 645; Powe v. McLeod, 76 Ala. 418; Pope v. Brandon, 2 Stew. (Ala.) 401; Dyson v. Simmons, 48 Md. 207; Stannis v. Nicholson, 2 Oreg. 332.

¹¹³ Cooper v. Cooper, 14 La. Ann. 665.

¹¹⁴ See *infra*, §§ 441-444.

¹¹⁵ Clay v. Hildebrand, 34 Kans. 694, 9

Pac. Rep. 466; Valentine, J. See, to the same effect, Fleenor v. Driskill, 97 Ind. 27; Hofferbert v. Klinkhardt, 58 Ill. 450; Succession of Durnford, 1 La. Ann. 92; Fowler v. Doyle, 16 Iowa, 534.

¹¹⁶ Walker v. Page, 21 Gratt. 636.

¹¹⁷ Thayer v. McGee, 20 Mich. 195.

¹¹⁸ Kelly v. McKibben, 53 Cal. 12.

recital to have been a clerical mistake and that it was the plaintiff who demurred.¹²⁹ But a judgment must follow the verdict; and in a case where the jury returned two verdicts, as follows: "We the jury find for the plaintiff and assess his damages in the sum of \$800," and, "We the jury find for the defendant on the counter-claim and set-off and assess the damages in the sum of \$300," it was held to be error in the court to overrule a motion for a *venire de novo*, and render judgment for the plaintiff for \$500.¹³⁰ The presumption in support of the judgment extends to inferring the presence of the plaintiff in court, for the purpose of an act which he only could perform, although the entry only recites the presence of his attorney.¹³¹

§ 124. The Judgment-Roll, or Record.

It seems appropriate, in this connection, to give some account of the judgment-roll or record of the judgment. At common law the judgment-roll was a roll of parchment upon which all the proceedings in the cause, up to the issue, and the award of *venire* inclusive, together with the judgment which the court awarded in the cause, were entered. It included as well the pleadings and process as the signing of judgment.¹³² In our modern practice, the proceedings are not thus transcribed, although in some states they are required to be copied with more or less detail into books kept for that purpose, and in others a "judgment roll," consisting of the writ, pleadings, and other papers in the cause, must be on file when the clerk enters judgment. And for the purpose of an appeal, or other similar use, the "record" comprises a full copy of all the papers and proceedings in the cause. The following account of the practice obtaining in

¹²⁹ Evans v. McMahan, 1 Ala. 45.

¹³⁰ Baughn v. Baughn, 114 Ind. 73, 17 N. E. Rep. 181. See Jarboe v. Brown, 89 Ind. 549.

¹³¹ Thomason v. Odum, 81 Ala. 108.

¹³² Brown, Law Dict.; Vail v. Iglehart, 69 Ill. 332. Brown says that in modern English practice "the making up and depositing the judgment-roll is gener-

ally neglected, unless in cases where it becomes absolutely necessary to do so, as when, for instance, it is required to give the proceedings in the cause in evidence in some other action, for in such case the judgment-roll or an examined copy thereof, is the only evidence of them that will be admitted." And see Steph. Plead. 24.

Illinois will be found applicable in many of the states. "Under our practice, while the pleadings, process, etc., are not, as at common law, required to be copied on a parchment roll, nor in the record book in which final judgment is entered, they are required to be filed in the office of the clerk; and when a copy of the record of the judgment is required, for the purpose of bringing the case by appeal or writ of error into this court, or bringing suit upon it in another state, or as evidence under an issue of *nul tiel record*, or to establish a former adjudication of the same subject-matter between the same parties, and indeed in all cases where it is essential to have a complete record of a judgment, the pleadings and process are an indispensable part of it. And the general rule is, that where the copy of a record of a judgment is required, it must be of the whole record, so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part."¹²³ In Massachusetts, the clerk's docket is the record of the court, until the record is fully extended, and every entry upon it is the statement of an act of the court, which is presumed to be made by its direction, in pursuance either of an order for the particular entry, or of a general order, or of a general usage pre-supposing such an order.¹²⁴ A record, it will be remembered, imports absolute verity, must be tried by itself, and cannot be contradicted.¹²⁵

§ 125. Supplying Lost Records.

The power of supplying a new record, where the original has been lost or destroyed, is one which pertains to courts of general jurisdiction independent of legislation, and if the statute also confers a power, and prescribes a practice, in that behalf, it does not merge

¹²³ Vail v. Iglehart, 69 Ill. 332; Steverson v. Earnest, 80 Ill. 513.

¹²⁴ Read v. Sutton, 2 Cush. 115. A judgment recovered before a magistrate may be proved by his memoranda upon his docket and upon the original writ, and by the production of the original papers in the case, verified by the tes-

timony of the magistrate, if these, taken together, show clearly all the essential particulars of a valid judgment, and no extended record has been made. McGrath v. Seagrave, 2 Allen, 443, 79 Am. Dec. 797.

¹²⁵ Adams v. Betz, 1 Watts, 425, 26 Am. Dec. 79.

the inherent authority of the courts.¹²⁶ Hence if, for example, the notice of a motion for leave to substitute a new record is explicit in describing a judgment and papers alleged to be lost, it is sufficient, although it does not conform to a statute which provides for such a proceeding.¹²⁷ The destruction of the record book in which judgments are written, does not destroy the judgment-debts, and though the judgments are wrongfully restored by the court without notice to the debtors, yet when the judgments are revived by *scire facias* with notice to the debtors, they should make their objection by plea of *null tiel record*.¹²⁸ On a motion to supply a lost record, the proper practice is as follows. The notice of the motion must specify when the motion will be made, and must contain a copy of that which the plaintiff will move the court to enroll as the substance of the lost record, and the defendant must have reasonable personal service of the notice, and also of the affidavits by which it will be supported, which affidavits may be controverted by counter-affidavits. If the court, on hearing the affidavits, is fully satisfied of the loss or destruction of the original record and of the correctness of the proposed substitute, it will order the substitute to stand enrolled as and for the original.¹²⁹ The application must be made to the court in which the record originally remained. The courts of chancery will not entertain jurisdiction of a bill to restore to the judgment-creditor the benefit of his judgment, for the reason that there is an adequate remedy at law, by motion in the court in which the judgment was rendered.¹³⁰ "The inherent power of courts to control their own records, and to supply losses therein, is antagonistic to the power of any other court to interfere and make records for them. By this proceeding, one court of special jurisdiction is invoked to take cognizance of, and to supply to another court of general jurisdiction, a record, in lieu of one which has been destroyed. This power, once admitted will place the records of the courts of common law at the mercy of the court of chan-

¹²⁶ *Doswell v. Stewart*, 11 Ala. 629; *Gammon v. Knudson*, 46 Iowa, 455; *George v. Middough*, 62 Mo. 549; *Keen v. Jordan*, 18 Fla. 827; *Garibaldi v. Carroll*, 38 Ark. 568.

¹²⁷ *Doswell v. Stewart*, 11 Ala. 629.

¹²⁸ *George v. Middough*, 62 Mo. 549. And see *Gibson v. Vaughan*, 61 Mo. 418.

¹²⁹ *Adkinson v. Keel*, 25 Ala. 551.

¹³⁰ *Fisher v. Sievres*, 65 Ill. 99.

cery, and might lead to absurd conflict between the law and equity side of the court over the records of the common law. . . . There is nothing here requiring the exercise of the conscience of the court which may not be attained by a simple proceeding, according to the course of the common law, and therefore chancery has no office to perform."¹²¹

¹²¹Keen v. Jordan, 18 Fla. 837. On a motion to substitute the record of a destroyed judgment, the defendant cannot contest the truth of the recitals of the proposed record, though he may show that the lost record contained no such recitals. Peddy v. Street (Ala.), 6 South. Rep. 8.

CHAPTER VII.

THE ENTRY OF JUDGMENTS NUNC PRO TUNC.

- § 126. Origin and Nature of the Power.
- 127. Delay by Act of the Court.
- 128. Delay by Motions or Appeal.
- 129. Laches of Party.
- 130. Supplying Entry of Judgment.
- 131. Correction of Clerical Errors.
- 132. Not a proper Means of changing or revising the Judgment.
- 133. Only proper when Final Judgment could be entered.
- 134. Notice of Application.
- 135. Evidence.
- 136. Relation back of Order.
- 137. Effect upon Third Persons.

§ 126. Origin and Nature of the Power.

The phrase *nunc pro tunc*, "now for then," is used to indicate that something which was omitted to be done at the proper time is afterwards performed with a retroactive effect, that is, it is to have the same force and virtue, and be attended by the same consequences as if it had been regularly done. In relation to judicial proceedings, the performance of acts *nunc pro tunc* may take place in the various stages of the progress of a suit, and instances are not uncommon of affidavits or other papers filed in this manner. But in this connection we are only concerned with the entry and the amendment of judgments *nunc pro tunc*, and in this chapter only with the former. The power of the courts, whether of law or equity, to make entries of judgments or decrees *nunc pro tunc*, in proper cases and in furtherance of the interests of justice, is one which has been recognized and exercised from ancient times, and as a part of their common law jurisdiction.¹ This power therefore does not depend upon statute; it

¹Lord Mohun's Case, 6 Mod. 59; Keyes, 6 Paige, 478; Hess v. Cole, 28 N. J. Law, 116; Dial v. Holter, 6 Ohio St. 228; Swain v. Naglee, 19 Cal. 137; Reid v. Morton, 119 Ill. 118, 6 N. E. Rep. 414; Shephard v. Brenton, 20 Iowa, 41.

is inherent.² It rests partly upon the right and duty of the courts to do entire justice to every suitor, and partly upon their control over their own records and authority to make them speak the truth. When a judgment is allowed to be thus entered in order that the party may not suffer for what has transpired during a delay caused by the court, it exhibits a practical application of the maxim *actus curiæ neminem gravabit*. But the authority is much wider than this, and the power must not be confounded with the illustration of it. The cases calling for the exercise of this power of the courts are chiefly of two kinds; first, where no judgment was actually rendered, although one might or ought to have been; second, where a judgment was actually rendered, but never entered or put upon the records. We shall first consider the former class of cases.

§ 127. Delay by Act of the Court.

In any instance where a party has brought his case to trial and proceeded to present it on the merits and submit the decision, and before any judgment is rendered one of the parties dies, the court, in order that the time consumed by it in deliberation, without laches of the party who was successful in the suit, may not operate to his disadvantage, will not allow the action to abate, but instead will enter judgment *nunc pro tunc*, as of the time of the submission.³ Or,

² *Chissom v. Barbour*, 100 Ind. 1.

³ *Mayor of Norwich v. Berry*, 4 Burr. 2277; *Toulmin v. Anderson*, 1 Taunt. 385; *Bridges v. Smyth*, 8 Bing. 29; *Blewett v. Tregonning*, 4 Ad. & El. 1003; *Green v. Cobden*, 4 Scott's Cas. 486; *Key v. Goodwin*, 1 Moo. & S. 620; *Harrison v. Heathorn*, 1 Dowl. & L. 529; *Evans v. Rees*, 12 Ad. & El. 167; *Moor v. Roberts*, 3 C. B. N. S. 844; *Seymour v. Greenwood*, 30 L. J. Ex. 189; *Abington v. Lipscomb*, 11 L. J. Q. B. N. S. 15; *Davies v. Davies*, 9 Ves. Jr. 461; *Neil v. McMillan*, 27 U. C. Q. B. 257; *Mitchell v. Overman*, 108 U. S. 62; *Griswold v. Hill*, 1 Paine, 488; *Goddard v. Bolster*, 6 Me. 427, 20 Am. Dec. 320; *Blaisdell v.*

Harris, 53 N. H. 191; *Collins v. Prentice*, 15 Conn. 428; *Brown v. Wheeler*, 18 Conn. 199; *Perry v. Wilson*, 7 Mass. 393; *Tapley v. Goodsell*, 122 Mass. 176; *Ryghtmyer v. Dunham*, 12 Wend. 245; *Spalding v. Congdon*, 18 Wend. 543; *Holmes v. Honie*, 8 How. Pr. 333; *De Agreda v. Mantel*, 1 Abb. Pr. 180; *Campbell v. Mesier*, 4 Johns. Ch. 334, 8 Am. Dec. 570; *Wood v. Keyes*, 6 Paige, 473; *Kissan v. Hamilton*, 20 How. Pr. 369; *Fulton v. Fulton*, 8 Abb. N. C. 210; *Long v. Stafford*, 108 N. Y. 275, 8 N. E. Rep. 522; *Hess v. Cole*, 23 N. J. Law, 116; *Wilson v. Myers*, 4 Hawks, 73, 15 Am. Dec. 510; *Isler v. Brown*, 66 N. Car. 556; *Beard v. Hall*, 79 N. Car. 506;

if justice so require, the judgment may be entered as of the day in the term when the last of the evidence was submitted.⁴ And a judgment may be entered *nunc pro tunc* against one of several defendants, as well as against a sole defendant, when death takes place after verdict and before judgment.⁵ The same practice obtains, under the same conditions, in chancery. Thus, a party in interest having died since the argument and before the signing of a decree, the decree and orders in the cause should be signed and filed as of the date of the argument.⁶ The case may also be put in an irregular position by reason of the death of the *plaintiff* after a verdict. And here also the salutary power of giving judgment retrospectively may be invoked. By the common law practice, since the delay of the court must not be allowed to prejudice the parties, if the plaintiff die during the time the case is under advisement, judgment will be entered for him *nunc pro tunc* as of the time of the return of the *possession*.⁷ But in English practice (and probably the rule is general) the power to so enter judgment does not extend to suits in tort. Thus, in an action for libel, where the plaintiff died after the signing of interlocutory judgment and the execution of the writ of inquiry, but before the next day in banc, it was held that final judgment could not be entered for him for the damages assessed, the suit having abated by his death, and the case not being provided for by the statute 17 Car. II, c. 8, § 1, regulating the procedure where plaintiff dies between verdict and judgment.⁸ But it is not only the death of a party that will justify the exercise of this power. It may be employed to overreach any event transpiring while the case is in the hands of the court, and which would otherwise rob the successful suitor of his judgment. Thus, in a case in Massachusetts, where the action was upon a statute which was afterwards repealed, but before the repeal-

Allston v. Sing, Riley, 199; Powe v. McLeod, 76 Ala. 418; McLean v. State, 8 Heisk. 23; Pool v. Loomis, 5 Ark. 110; Dial v. Holter, 6 Ohio St. 228; *In re Estate of Jarrett*, 49 Ohio St. 199; *Estate of Page*, 50 Cal. 40.

⁴Citizens' Bank v. Brooks, 28 Fed. Rep. 21.

⁵Harrison v. Heathorn, 1 Dowl. & L. 529.

⁶Burnham v. Dalling, 16 N. J. Eq. 810.

⁷Jackson v. Mayor of Berwick, 1 Mod. 86.

⁸Ireland v. Champneys, 4 Taunt. 884. But see Brown v. Wheeler, 18 Conn. 199.

ing statute went into operation the action was tried and verdict rendered for the plaintiff, and questions of law were reserved, which, after the repeal took effect, were decided in favor of the plaintiff, the court ordered judgment to be entered on the verdict as of a day previous to the going into operation of the repealing act.⁹

§ 128. Delay by Motions or Appeal.

The principle that a party shall not be prejudiced by the act of the court, or the delay incident to legal proceedings, applies equally where the successful litigant finds his progress obstructed, after verdict, by the pendency of a motion or appeal, during which his adversary dies. Hence, where the defendant, after a verdict is given against him, moves for a new trial, and dies before the decision of the motion, and the motion is subsequently overruled, the judgment may be entered up for the plaintiff, *nunc pro tunc*, as of the term when the verdict was returned.¹⁰ And conversely, if a verdict be found for the plaintiff, and a motion is made in arrest of judgment, during the pendency of which the *plaintiff* dies, the judgment will be entered, the motion being denied, as of the day of the verdict, or as of a term after the verdict when the plaintiff was still alive; and in such a case, it is held, it makes no difference whether the cause of action would or would not survive.¹¹ So also if the plaintiff dies during the pendency of a motion, and the motion is subsequently decided in favor of the defendant, the latter may enter up his judgment as of a term before the decease of the plaintiff.¹² Where an appeal has been taken, and one of the parties dies before hearing in the appellate court, the proper practice is to affirm or reverse the judgment below *nunc pro tunc*.¹³ So in a case where the cause was transferred for consideration by the court in banc, upon exceptions taken by the defendant, and while it was there pending the defendant died, and

⁹ *Springfield v. Worcester*, 2 Cush. 52.

¹⁰ *Den v. Tomlin*, 18 N. J. Law, 14, 35 Am. Dec. 525; *Terry v. Briggs*, 12 Cush. 819; *Dial v. Holter*, 6 Ohio St. 328; *Fitzgerald v. Stewart*, 53 Pa. St. 843; *Brown*

v. Wheeler, 18 Conn. 199; *Collins v. Prentice*, 15 Conn. 423.

¹¹ *Griffith v. Ogle*, 1 Binn. 173; *Brown v. Wheeler*, 18 Conn. 199.

¹² *Spalding v. Congdon*, 18 Wend. 543.

¹³ *Snow v. Carpenter*, 54 Vt. 17.

afterwards the exceptions were overruled, it was held that the plaintiff should have judgment as of the term when the verdict was rendered.¹⁴ Where an appeal is taken and final judgment not entered, and the appeal is afterwards withdrawn or set aside for irregularity, the judgment may be entered *nunc pro tunc* on the verdict.¹⁵ And in a case in the supreme court of the United States, where the appellee died after the argument of a motion to dismiss the appeal, the order on the motion was entered *nunc pro tunc* as of the day of the argument.¹⁶

§ 129. Laches of Party.

If a delay in the entering of a judgment, after verdict or submission, is not attributable to the act of the court in holding the case under advisement, or the pendency of a motion or other interruption, but is caused by the laches of the party entitled to judgment, and during the interval a party dies, judgment *nunc pro tunc* will not be allowed.¹⁷ There is, of course, no room here for the application of the maxim above quoted, and the ends of justice do not require that the law should restore to a party an advantage which he may have lost through his own negligence or hesitation.

§ 130. Supplying Entry of Judgment.

We come now to the second class of cases mentioned above—those where a judgment was actually rendered by the court, but was never put upon the records. And the rule is, that in any case where the court did actually render a formal judgment, but the same has not been entered on the record, in consequence of any accident or mistake, or through the neglect or misprision of the clerk, the court

¹⁴Blaisdell v. Harris, 52 N. H. 191. Where the defendant in a criminal cause has been found guilty by the verdict of a jury, and appeals before an entry of final judgment against him, the district court may enter final judgment *nunc pro tunc* after a term has intervened since the verdict. *Ex parte* Beard, 41 Tex. 284.

¹⁵Kane v. Hills, R. M. Charl. 108; Hardee v. Stovall, 1 Ga. 92.

¹⁶Richardson v. Green, 180 U. S. 104, 9 Sup. Ct. Rep. 443.

¹⁷Fishmongers' Co. v. Robertson, 3 C. B. 970; Wilkes v. Perks, 5 Man. & G. 376.

has power to order that the judgment once pronounced be entered *nunc pro tunc*, upon the production of proper evidence to establish the fact of the judgment and to show its terms and character and the relief granted; and this may be done after the expiration of the term at which the judgment was originally given.¹⁸ Thus, where, on a plea of *nul tiel record*, the court decided that there was such a record, but in consequence of the mistake of the prothonotary judgment was omitted to be entered, after which the defendant died, it was held that the court might, in order to do justice, enter judgment as of the time when it ought to have been entered, although nearly eight years had elapsed, provided third persons were not injured thereby.¹⁹ The rule has also been extended to the case of a judgment confessed in a pending action. Where a confession of judgment is entered on the declaration on file, but not on the minutes of the court, in the absence of proof of any fraud in the entry, it may, at a subsequent term, be entered on the minutes *nunc pro tunc*, without notice to the defendant.²⁰ Every court has a right to judge of its own records and minutes, and if it should appear satisfactorily to it that an *order* was actually made at a former term and omitted to be entered by the clerk, it may, at any term, direct such order to be entered on the records as of the term when it was made.²¹

§ 131. Correction of Clerical Errors.

"That a court has a right, at a term subsequent to one at which a judgment is rendered, to correct, by an order *nunc pro tunc*, a clerical

¹⁸ *Chichester v. Cande*, 8 Cow. 39, 15 Am. Dec. 238; *Hagler v. Mercer*, 6 Fla. 721; *Wilkerson v. Goldthwaite*, 1 Stew. & P. 159; *Wharley v. Railroad*, 73 Ala. 20; *Cotten v. McGehee*, 54 Miss. 621; *Forbes v. Navra*, 68 Miss. 1; *Hammer v. McConnell*, 3 Ohio, 81; *Howell v. Marlan*, 78 Ill. 163; *Ives v. Hulce*, 17 Ill. App. 30; *Shephard v. Brenton*, 20 Iowa, 41; *Gibson v. Chouteau*, 45 Mo. 171, 100 Am. Dec. 366; *Groner v. Smith*, 49 Mo. 818; *Belkin v. Rhodes*, 76 Mo. 648; *Swain v. Naglee*, 19 Cal. 127; *Dreyfuss*

v. Tompkins, 67 Cal. 339, 7 Pac. Rep. 782.

¹⁹ *Murray v. Cooper*, 6 Serg. & R. 126.

²⁰ *Davis v. Barker*, 1 Ga. 559. Where an action is dismissed during vacation, under a statute authorizing plaintiffs to dismiss actions, and no entry is made, an entry *nunc pro tunc* may be made at the next term. *Mountain v. Rowland*, 30 Ga. 929.

²¹ *Burnett v. State*, 14 Tex. 453, 65 Am. Dec. 181; *Ferguson v. Millaudon*, 12 La. Ann. 343.

error or omission in the original entry, is indisputable. The error, whether of commission or omission, must appear from the record of the proceedings in which the entry of judgment is made."²² Thus a judgment is not rendered void by an omission to sign it, but may be amended, even after the lapse of ten years, by an order to supply the proper signature *nunc pro tunc*.²³ And even during the pendency of an appeal a judgment may be amended *nunc pro tunc*, in respect, for example, to proof of acknowledgment of service of process and to the waiver of exemptions, at a subsequent term of the trial court, and when properly certified to the appellate court, the amendment is before such court for consideration, and will relate back and sustain the judgment.²⁴ When the clerk is ordered by the court at a subsequent term to supply a clerical omission in the record of a judgment by an entry *nunc pro tunc*, the proper course for him to pursue would be to enter anew in the proceedings of that term the entire judgment as corrected; and the action of the clerk in supplying the omitted part of the judgment, by an interlineation in the record of the preceding term, is considered as loose, irregular, and reprehensible. Nevertheless such improprieties of the clerk would probably not have the effect of rendering the judgment a nullity.²⁵

§ 132. Not a proper Means of changing or revising the Judgment.

The power of courts to order the entry of judgments *nunc pro tunc* is not to be used for the purpose of correcting errors, omissions, or mistakes of the court; it cannot direct a proper judgment to be thus entered when the fault is that the first judgment is one which should not have been entered in the case, or is imperfect or improper.²⁶ The object and effect of an amendment *nunc pro tunc*

²² Allen v. Sales, 56 Mo. 28.

²³ Pollard v King, 62 Ga. 108. As to the necessity of signing a judgment, see § 109 *supra*.

²⁴ Seymour v. Thomas Harrow Co., 81 Ala. 250, 1 South. Rep. 45.

²⁵ Allen v. Sales, 56 Mo. 28.

²⁶ Gray v. Brignardello, 1 Wall. 637;

In re Limerick Petitioners, 18 Me. 183; Smith v. Hood, 25 Pa. St. 218, 64 Am. Dec. 692; Perkins v. Dunlavy, 61 Tex. 241; Hyde v. Curling, 10 Mo. 359; Gibson v. Chouteau, 45 Mo. 171, 100 Am. Dec. 866; Evans v. Fisher, 26 Mo. App. 541; Whitwell v. Emory, 3 Mich. 84, 59 Am. Dec. 220.

of a judgment is to furnish proper evidence of acts properly done by the court, but not properly exhibited by its record; and such evidence is furnished in this manner, for the purpose of supporting those acts which, although the proper consequences of a judgment, would seem to be irregular and void because there was no proper evidence of a judgment.²⁷ Hence the court cannot at a subsequent term change its judgment to one which it neither rendered nor intended to render;²⁸ nor supply an order which it might or ought to have made, but wholly omitted to make.²⁹ Nor can such an entry be made by the court for the purpose of reversing its action in respect to what it formerly refused to do or assent to.³⁰ Yet the cases hold that if, in an action by two or more plaintiffs, or against two or more defendants, judgment has been mistakenly entered for one plaintiff only, or against one defendant only, as the case may be, a proper judgment *nunc pro tunc* may be subsequently entered, without notice, if the record furnishes sufficient ground.³¹

§ 133. Only proper when Final Judgment could be entered.

The rule that a judgment may be entered *nunc pro tunc*, when such action is necessary in order to save a party from being unjustly prejudiced by a delay caused by the act of the court or the

²⁷ *Adams v. Higgins*, (Fla.), 1 South. Rep. 321. "The entire purpose of entering orders or judgments as of some prior date, is to supply matters of evidence. The failure of a court to act does not authorize the entry of a *nunc pro tunc* order or judgment. If no order or judgment was in fact rendered, the court cannot treat such defect as a clerical error. But when it is clear that an order or judgment was in fact rendered, but was not entered upon the journal through the inadvertence or negligence of the clerk, the court has authority to order it to be supplied. In such a case, the record is merely amended by inserting in the memorial of the proceedings of the

court that which has been omitted therefrom." *Maxwell, J., in Garrison v. People*, 6 Nebr. 274, 281.

²⁸ *Ross v. Ross*, 83 Mo. 100.

²⁹ *Hyde v. Curling*, 10 Mo. 359.

³⁰ *Moore v. State*, 63 Ga. 165.

³¹ *Allen v. Bradford*, 8 Ala. 281, 37 Am. Dec. 639. It is held in *Arkansas* that if, on appeal from a justice of the peace, judgment is recovered against the appellant and his sureties in the appeal bond, and the clerk omits to include the sureties in the entry of judgment, a *nunc pro tunc* judgment may be entered against them at a subsequent term without notice to them. *Freeman v. Mears*, 85 Ark. 278; *Shaul v. Duprey*, 48 Ark. 331, 8 S. W. Rep. 366.

course of legal procedure, must be taken with an important restriction, viz., that such an entry is not proper unless the case was in such a condition, at the date to which the judgment is to relate back, that a final judgment could then have been entered immediately. If it were otherwise, the death of one's adversary, for example, might operate to one's positive advantage. But this is not the object of the practice. It is intended merely to secure that one shall not suffer for an event which he could not avoid. As it has been said, "a judgment *nunc pro tunc* in case of death is proper only when a party dies after hearing, while the case is under advisement, or after the case has proceeded so far that judgment can be entered, if not as a merely formal act, at least without the need of further inquiry or evidence into matters of fact involved in the controversy."²² Hence if there is no verdict in the record, the court cannot at a subsequent term order a verdict and judgment to be entered *nunc pro tunc*; if the record does not show that a verdict was rendered, it cannot be supplied at a subsequent term of the court.²³

§ 134. Notice of Application.

In Alabama it is the settled practice of the courts that a judgment *nunc pro tunc* may be entered at a subsequent term without notice to the opposite party, if there is any order or memorandum of record to warrant the entry.²⁴ In New York, also, it is held that an entry of judgment *nunc pro tunc* may be ordered without notice, and an improper notice is a mere irregularity, not a fatal defect.²⁵ But in some other states the view holds, that although a judgment may be entered on a verdict without notice, yet an application to amend a judgment after the term at which it was rendered, must be made upon notice to the adverse party.²⁶ In general, we may say that the neces-

²²Hazard v. Durant, 14 R. I. 25.

²³Gray v. Thomas, 12 Sm. & Mar. 111; Jennings v. Ashley, 5 Ark. 128. And see North v. Pepper, 20 Wend. 677; Kissam v. Hamilton, 20 How. Pr. 875.

²⁴Mays v. Hassell, 4 Stew. & Port. 223, 24 Am. Dec. 750; Bentley v. Wright, 8 Ala. 607; Allen v. Bradford, 8 Ala. 281; Glass v. Glass, 24 Ala. 468; Nabers v.

Meredith, 67 Ala. 833. Compare Womack v. Sanford, 37 Ala. 445.

²⁵Long v. Stafford, 103 N.Y. 274, 8 N. E. Rep. 523.

²⁶Berthold v. Fox, 21 Minn. 51; Hill v. Hoover, 5 Wis. 386; Weed v. Weed, 25 Conn. 387; King v. Burnham, 129 Mass. 593. See *infra*, § 164.

sity of notice of such an application must depend upon the sources which are to furnish the evidence of the judgment to be entered. If the examination is to be confined to the records, the presence of the defendant could not affect the result, nor would he have room to contest it. But if it is to be based on extraneous proof, it is but just that he should have the opportunity to prepare countervailing testimony.

§ 135. Evidence.

It is held in several of the states that the evidence which will justify the court in entering a judgment *nunc pro tunc* must be record evidence; that is, that such entry can only be made upon the production of some note, entry, or memorandum from the records or *quasi* records of the court, which shows in itself, without the aid of parol evidence, that the alleged judgment was rendered, and what were its character and terms.⁸⁷ "We think," said the court in Alabama, "that no judgment can be amended, or one rendered *nunc pro tunc*, unless such amendment or rendition of judgment be authorized by matter of record, or by some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at the least by some book belonging to the office of the court and required to be there kept by law."⁸⁸ It is somewhat difficult to ascertain from the authorities what will be considered record evidence for this purpose. But it is held that the entry may be based on the judge's minutes or the clerk's entries, or some paper on file in the case, but cannot be made upon the judge's recollection of what took

⁸⁷ *Adams v. ReQua*, 23 Fla. 250; *Draughan v. Bank*, 1 Stew. (Ala.) 66, 18 Am. Dec. 38; *Andrews v. Branch Bank*, 10 Ala. 375; *Hudson v. Hudson*, 20 Ala. 364, 56 Am. Dec. 200; *Metcalf v. Metcalf*, 19 Ala. 819, 54 Am. Dec. 190; *Yonge v. Broxson*, 23 Ala. 684; *Ex parte Jones*, 61 Ala. 399; *Ex parte Gilmer*, 64 Ala. 234; *Lilly v. Larkin*, 66 Ala. 123; *Herring v. Cherry*, 75 Ala. 376; *Kemp v. Lyon*, 76 Ala. 212; *Shackelford v. Levy*, 63 Miss. 125; *Raymond v. Smith*, 1 Met. (Ky.) 65, 71 Am. Dec. 453; *Ludlow v.*

Johnson, 8 Ohio, 553, 17 Am. Dec. 609; *Coughran v. Gutcheus*, 18 Ill. 390; *Cairo & C. R. Co. v. Holbrook*, 73 Ill. 419; *Hyde v. Curling*, 10 Mo. 359; *Gibson v. Chouteau*, 45 Mo. 171, 100 Am. Dec. 366; *Fletcher v. Coombs*, 58 Mo. 430; *Atkinson v. Railroad*, 81 Mo. 50; *Blize v. Castle*, 8 Mo. App. 290; *Swain v. Naglee*, 19 Cal. 127; *Hegeler v. Henckell*, 27 Cal. 491.

⁸⁸ *Hudson v. Hudson*, 20 Ala. 364, 56 Am. Dec. 200.

place at the trial or upon outside evidence.³⁹ So entries on the court and bar docket, which are *quasi* records, are admissible evidence; and a recital in the amending judgment that the court "is of opinion" from an inspection of said docket, etc., is equivalent to an averment that the court deemed the evidence satisfactory, and is sufficient to sustain the amendment, unless the entries themselves are shown to be insufficient.⁴⁰ And where an order approving the report of commissioners in partition, although informal, taken in connection with the report itself, affords sufficient data, there is no error in the entry at a subsequent term of a judgment *nunc pro tunc* ratifying and giving effect to the report.⁴¹ So a memorandum written by the presiding judge across a motion entered on the motion-docket will authorize a *nunc pro tunc* order.⁴²

On the other hand there are numerous cases which hold that an entry *nunc pro tunc* may be ordered on *any* evidence that is sufficient and satisfactory, whether it be parol or otherwise.⁴³ But the general balance of authority seems to be with the cases holding that so far as concerns the question whether a judgment was ever rendered, that fact must be established by record evidence and cannot be proved by parol,—a rule which, if conservative, is also entirely safe. Thus, when a case stands on the docket as not disposed of, and *no entry* on the papers or elsewhere is produced indicating any disposition of it, a final judgment cannot be entered *nunc pro tunc* on parol testimony alone, unaided by the judge's recollection, especially where counsel for one of the parties denies on oath all knowledge of the alleged judgment, and there is no positive affirmative evidence but that of the adverse counsel.⁴⁴ But when the fact that a judgment

³⁹ Belkin v. Rhodes, 76 Mo. 648; Graham v. Lynn, 4 B. Mon. 17, 89 Am. Dec. 493; Short v. Kellogg, 10 Ga. 180.

⁴⁰ Farmer v. Wilson, 34 Ala. 75.

⁴¹ Mead v. Brown, 65 Mo. 552. And see Wade v. Bryant (Ky.) 7 S. W. Rep. 397.

⁴² Harris v. Bradford, 4 Ala. 214. Where the files of the court, the motion, the entry of its filing, its purpose, and the entry of similar orders in the same cause, show that the order was

made, a *nunc pro tunc* entry may be made. Hansbrough v. Fudge, 80 Mo. 307.

⁴³ Frink v. Frink, 43 N. H. 508, 80 Am. Dec. 189; Rugg v. Parker, 7 Gray, 172; Weed v. Weed, 25 Conn. 337; Jacobs v. Burgwyn, 63 N. Car. 193; Aydelotte v. Brittain, 29 Kans. 98; Bobo v. State, 40 Ark. 224; Brownlee v. Commissioners, 101 Ind. 401.

⁴⁴ Robertson v. Pharr, 56 Ga. 245; Cadwell v. Dullaghan, 74 Iowa. 239, 37

was formerly rendered is established by record evidence, it seems entirely reasonable to admit parol proof for the purpose of showing its date, character, and terms, and the relief granted. And it is so held by many respectable authorities.⁴⁵ In order to entitle a party to have a judgment entered on the minutes *nunc pro tunc*, he must show when it was rendered; certainly at what term of the court, if not on what day of the term.⁴⁶

§ 136. Relation back of Order.

A *nunc pro tunc* entry of judgment is made as of the time the proceedings of the court actually took place, and becomes a part of the entry of that date the same as if entered then.⁴⁷ Hence the entry, by its relation back, will cure any variance between the judgment as originally (defectively) entered and the execution issued thereon.⁴⁸ "There can be no doubt that such an entry may operate so as to save proceedings which have been had before it is made. For instance, a judgment is actually made at one term, but through mistake or negligence is not entered of record. Subsequent to the term, the plaintiff, under the impression that the business had all been correctly transacted, prays out execution. The property of the judgment-debtor is levied upon and sold to a *bona fide* purchaser, who parts with his money in good faith. In such case the court may with propriety enter a judgment, to be considered of the term in which it was actually rendered and should have been entered. Such proceedings should be for the furtherance of justice. It would do no injury to the parties concerned, and would secure the rights of an innocent purchaser."⁴⁹ But it is held that for the purpose of a statute of lim-

N. W. Rep. 178. Such entry should not be ordered by a judge other than the one who is claimed to have made the original order, upon the mere statement of counsel, excepted to by opposing counsel, that such order was made. *Carter v. McBroom*, 85 Tenn. 377, 2 S. W. Rep. 808.

⁴⁵ *Camoran v. Thurmond*, 56 Tex. 22; *Burnett v. State*, 14 Tex. 455; *Johnson v. Wright*, 27 Ga. 555; *Weed v. Weed*,

25 Conn. 337; *Frink v. Frink*, 43 N. H. 503, 80 Am. Dec. 189; *Rugg v. Parker*, 7 Gray, 172; *Clark v. Lamb*, 8 Pick. 415, 19 Am. Dec. 332; *Davis v. Shaver*, 1 Phill. (N. Car.) 18.

⁴⁶ *Robertson v. Pharr*, 56 Ga. 245.

⁴⁷ *Bush v. Bush*, 46 Ind. 70.

⁴⁸ *Jordan v. Petty*, 5 Fla. 326.

⁴⁹ *Ludlow v. Johnston*, 3 Ohio, 553, 575.

itations, the date of the entry of a judgment *nunc pro tunc* is the date of the order of such entry, and not the day as of which the judgment is ordered to take effect.⁵²

§ 137. Effect upon Third Persons.

When a judgment is entered *nunc pro tunc*, its effect, so far as it operates by relation back to the earlier date, must be confined to the rights and interests of the original parties; at least it will not be allowed to work detriment to the rights of innocent third persons acquiring interests without notice of the rendition of any judgment.⁵³ Thus a purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time of the purchase, and it is not competent for a court to bind by a lien the land of a third person by the rendition of a *nunc pro tunc* judgment against his grantor.⁵⁴ So an entry *nunc pro tunc* of a probate decree of insolvency of the estate of a decedent takes effect, as against claims filed by creditors thereof, from the date of actual entry.⁵⁵ In order that such an entry of judgment may bind a person who is not a party thereto (such as a surety in a supersedeas bond given on appeal from the judgment as first entered), it must appear that he had notice of the judgment really rendered at the time his rights were acquired or his liability fixed thereunder, or that he had notice of the application to have the *nunc pro tunc* entry made and an opportunity to appeal therefrom.⁵⁶

⁵² *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. Rep. 842.

⁵³ *Bank of Newburgh v. Seymour*, 14 Johns. 219; *Vroom v. Ditmas*, 5 Paige, 528; *Smith v. Hood*, 25 Pa. St. 218, 64 Am. Dec. 692; *Galpin v. Fishburne*, 8 McCord, 23, 15 Am. Dec. 614; *Acklen v. Acklen*, 45 Ala. 609; *Graham v. Lynn*, 4 B. Mon. 18, 39 Am. Dec. 498; *Small v. Douthitt*, 1 Kana. 385; *Shirley*

v. Phillips, 17 Ill. 471; *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Koch v. Railroad*, 77 Mo. 354; *Hays v. Miller*, 1 Wash. Ter. 143.

⁵⁴ *Miller v. Wolf*, 68 Iowa, 238, 18 N. W. Rep. 839.

⁵⁵ *Acklen v. Acklen*, 45 Ala. 609.

⁵⁶ *Koch v. Atlantic & Pacific R. Co.*, 77 Mo. 354.

CHAPTER VIII.

AMOUNT AND CHARACTER OF RELIEF GRANTED.

- § 138. Amount greater than Plaintiff's Demand.
- 139. Assessment of Damages on Default.
- 140. Amount indorsed on Summons.
- 141. Prayer for Relief as Measure of Recovery.
- 142. Judgment must follow the Verdict.
- 143. Allowance of Credits.
- 144. Tender, Counterclaim, Offer of Compromise.
- 145. Joint Parties.
- 146. Affirmative Relief to Defendant.
- 147. Interest.
- 148. Conditions as to Payment.
- 149. Statutory Damages.
- 150. Designation of Amount.
- 151. Judgment designating Medium of Payment.
- 152. Judgment for Coined Money.

§ 138. Amount greater than Plaintiff's Demand.

Since judgments are usually rendered for a definite sum of money, and are intended either to enforce the payment of a legal debt, or to establish the existence of a legal right and give compensation for its infraction by an award of damages, it becomes important in this connection to consider the amount and character of the relief which may be granted, the mode of its ascertainment, and the question of designating the medium of payment. These matters will constitute the subject of the present chapter. And first, it is an undisputed rule that if a judgment be rendered for a greater sum, whether by way of debt or damages, than is laid in the *ad damnum* clause, or claimed in the declaration, petition, or complaint, or notified to the defendant by the demand in the summons, then the judgment will be erroneous and liable to reversal.¹ Thus, where a complaint con-

¹Chaffee v. Hooper, 54 Vt. 518; Andrews v. Monilaws, 15 N. Y. Supreme Ct. 66; Dennison v. Leech, 9 Pa. St. 164; Johnson v. Van Doren, 2 N. J. Law, 374; Lester v. Cloud, 67 Ga. 770; Hillebrant v. Barton, 39 Tex. 599; Janson v. Bank, 48 Tex. 599; Price v. Grand Rapids & C. R. Co., 18 Ind. 137; Oakes v.

tains two paragraphs, and there is a special finding of facts by the court, and the facts found support all the material allegations of one of the paragraphs, but not of the other, judgment must be rendered as upon the paragraph that is supported by the findings, and it cannot be for an amount greater than is claimed therein to be due.³ Nor is the application of this rule confined to contested actions. It is equally true, in cases where the defendant suffers a default, that a judgment for more than the plaintiff has claimed is erroneous, and may be set aside, modified on motion, or reversed on appeal.⁴ And a judgment for a greater sum than that laid in the declaration cannot stand, even though the defendant confesses judgment for the larger amount.⁵ Nor will the defendant's withdrawal of his pleas authorize or sustain a judgment for a sum in excess of that warranted by the cause of action stated in the petition.⁶ But it must be observed that a judgment so rendered for an excessive amount is *not void*.⁶ Relief may be had against it, or it may be corrected or set aside, in any appropriate mode; nevertheless it is not a mere nullity. Consequently it will stand as a valid adjudication until the proper steps are taken against it, and will be binding upon the parties and not open to collateral attack. And where this is the only error in the judgment it may be rectified without the necessity of entirely vacating it. Thus where a judgment is entered in an action on a bond for an amount greater than the penalty, it may be reformed by remitting the excess.⁷ So where a complaint prays judgment for the exact amount due at the first term after suit, but judgment is not then rendered, but is rendered at a subsequent term for a sum exceeding that asked for by the amount of the subsequently accrued

Ward, 19 Ill. 46; Stiles v. Brown, 8 Iowa, 589; Hayton v. Hope, 8 Mo. 58; Beckwith v. Boyce, 12 Mo. 440; Lamping v. Hyatt, 27 Cal. 99; Bond v. Pacheco, 80 Cal. 580.

³ Helms v. Kearns, 40 Ind. 124.

⁴ Andrews v. Monilaws, 15 N. Y. Supreme Ct. 65; Bond v. Pacheco, 80 Cal. 580. But a judgment by default may be rendered against a defendant regularly served with process, for an

amount greater than is stated in the summons, if within the damages claimed by the declaration. Thompson v. Turner, 22 Ill. 389.

⁵ Lester v. Cloud, 67 Ga. 770.

⁶ Janson v. Bank, 48 Tex. 599.

⁷ Chaffee v. Hooper, 54 Vt. 518; Bond v. Pacheco, 80 Cal. 580.

⁸ Anthony v. Estes (N. Car.), 8 S. E. Rep. 347.

interest only, such judgment will not be erroneous, but the complaint will be deemed to have been amended so as to demand judgment for the proper sum.⁸ It also appears that it is not error to render judgment for an amount of damages exceeding the *ad damnum* in the writ, after the action, together with other claims of the plaintiff against the defendant, has been referred to arbitrators under a rule of court.⁹

§ 139. Assessment of Damages on Default.

We have already seen, in the chapter on judgments by default, that if the amount which the plaintiff is entitled to recover is definitely fixed by the contract or other instrument on which he sues, a final judgment may at once be entered, upon the defendant's default, for such amount; and that the same is true if the amount can be ascertained by a matter of simple calculation. But in other cases, an interlocutory judgment must first be entered, fixing the plaintiff's right to recover, and then the damages assessed by a writ of inquiry or some other proper method.¹⁰ It is therefore erroneous for the court, in an action on an unliquidated claim, to proceed to render final judgment for a specific sum, without the preliminary assessment of damages.¹¹ And in an action on an open account, in which the defendant was defaulted, the judgment will be set aside if the record does not disclose in what manner and upon what proofs the amount of the judgment was ascertained.¹²

§ 140. Amount indorsed on Summons.

In some of the states, where the code practice is established, it is required by law that in all civil actions for the recovery of money only, the amount for which judgment will be taken, if the defendant

⁸ *Carpenter v. Sheldon*, 22 Ind. 359. That a judgment may be amended in respect to the amount of recovery, see *infra*, § 159.

⁹ *Day v. Berkshire Woollen Co.*, 1 Gray, 420.

¹⁰ *Supra*, § 89.

¹¹ *Beam v. Hayden*, 5 Bush, 426; *Evans v. Parks*, 10 Ark. 306; *Warren v. Kennedy*, 1 Heisk. 487.

¹² *Snell v. Irvine*, 17 Fla. 284.

fails to appear, shall be indorsed on the summons. When such indorsement is made, the defendant has a right to rely upon it as fixing a limit beyond which the court cannot go in rendering judgment, in case he chooses to make no appearance in the action, and it is error to exceed it.¹³

§ 141. Prayer for Relief as Measure of Recovery.

According to the settled practice in equity, the rule in regard to decrees is similar to that just stated as governing judgments at law, viz., that it is error to decree relief not sought in the bill. In other words, if the complainant has prayed for specific relief in the premises, or relief as to a specific subject-matter, no more extensive relief can properly be accorded to him.¹⁴ But it is usual to join with the demand for specific relief a prayer for general relief also, and where this is done, the court is not limited, in its dealing with the matters in litigation, to the orders or decrees particularly asked for, but may take such other action as may be necessary to fully adjust the equities, provided it be not inconsistent with the allegations of the bill and the facts in evidence.¹⁵ So where there are prayers for both specific and general relief, the court, if it refuses the specific relief asked, may still grant any other appropriate relief under the general prayer.¹⁶ But it is the settled rule in equity that a party must recover according to the case made by his bill or not at all,—*secundum allegata* as well as *secundum probata*. Hence, even under a prayer for general relief, the court cannot go outside the case made by the pleadings, and decree in favor of the plaintiff on grounds not stated in his complaint, or grant relief for matters not charged, although they may appear from other parts of the pleadings and be improperly in evidence.¹⁷ But the fact that more

¹³Cleveland Stove Co. v. Grimes, 9 Nebr. 128, 2 N. W. Rep. 845; Basset v. Mitchell (Kans.), 19 Pac. Rep. 671.

¹⁴Dodge v. Wright, 48 Ill. 382.

¹⁵Laverty v. Sexton, 41 Iowa, 435; Galloway v. Galloway, 58 Tenn. 328; Colton v. Ross, 2 Paige, 396; Wilkin v.

Wilkin, 1 Johns. Ch. 111; Kelly v. Paine, 18 Ala. 371; Stone v. Anderson, 26 N. H. 506; Allen v. Coffman, 1 Bibb, 469; Barr v. Haseldon, 10 Rich. Eq. 58.

¹⁶Rogers v. Brooks, 30 Ark. 612.

¹⁷Rome Exchange Bank v. Eames, 4 Abb. App. Dec. 83; Rogers v. Brooks,

extensive relief, of the same general nature, is prayed in the bill than is warranted by the proofs does not preclude giving so much as the evidence will sustain. Thus if the bill asks relief on an allegation of an abandonment of twenty-six acres of land, and the proof is that sixteen acres only were abandoned, the complainant may be relieved as to the sixteen.¹⁸

Under the code practice, where the forms of action are abolished, and either a legal or an equitable remedy, or both, may be prosecuted under the same method of procedure, the rules already stated will still hold good, though modified by certain statutory provisions, which we now proceed to notice. The codes generally provide that if there be no answer, the relief granted cannot exceed that which the plaintiff shall have demanded in his complaint.¹⁹ A recent decision in California, construing the phrase "cannot exceed," holds that, in case of default, it is improper to grant the plaintiff *any other* relief than that prayed for.²⁰ Whence it would appear that if the plaintiff has mistaken his remedy, or otherwise failed to demand the relief appropriate to his case, it would be beyond the power of the court to enter the proper judgment. But this view runs counter to that held in New York, where, the language of the statute being the same, the courts say: "The relief demanded by no means necessarily characterizes the action or limits the plaintiff in respect to the remedy which he may have. If there be no answer, the relief granted cannot exceed that which the plaintiff shall have demanded in his complaint. But the fact that after the allegation of the facts relied upon the plaintiff has demanded judgment for a sum of money by way of damages does not preclude the recovery of the same amount upon the same state of facts by way of equitable relief. The relief in the

80 Ark. 612. For example, if the owner executes two mortgages upon the same land, and the prior mortgagee enforces his mortgage in equity, without making the junior mortgagee a party defendant, and purchases the property at the sale and receives a sheriff's deed, the junior mortgagee may file a bill to redeem; but if his complaint contains only the usual averments in an action to

enforce a mortgage, and makes no reference to the prior mortgage, sale, and purchase, the court cannot enter a decree authorizing him to redeem. *Carpentier v. Brenham*, 50 Cal. 549.

¹⁸ *Railroad v. Ragsdale*, 54 Miss. 200.

¹⁹ Code N. Y. § 275; Code Civil Proc. Cal. § 580.

²⁰ *Mudge v. Steinhart* (Cal.), 20 Pac. Rep. 147.

two cases would be precisely the same; the difference would be formal and technical. If every fact necessary to the action is stated, the plaintiff may, even when no answer is put in, have any relief to which the facts entitled him consistent with that demanded in the complaint."²¹ But under this clause, where a complaint contains no prayer for damages, a judgment on default awarding damages is erroneous, although the complaint states facts sufficient to sustain such a judgment.²² However, under the codes, the extent of the relief to be granted by a judgment is restricted to that prayed for in the complaint *only* in cases where there is no answer; in all other cases any relief may be granted which is consistent with the case made by the pleadings.²³ Thus, for example, where the complaint in an action relating to land contains proper averments to entitle the plaintiffs to possession, and a general prayer for relief, and there are an appearance, trial, and finding that the plaintiffs are owners and entitled to possession, and defendant is in unlawful possession, judgment for possession is proper, though there is no specific prayer therefor.²⁴ So, in a case where the plaintiff, in an action to recover a street assessment, asked for a judgment against the defendant's lot but not for a personal judgment, and the court rendered judgment against the lot and also ordered that if the lot should not sell for the full amount of the plaintiff's claim, then a personal judgment for the balance should be docketed against the defendant, it was held that the action of the court was proper, it having jurisdiction of both the subject-matter and the person of the defendant.²⁵ Again, where the plaintiff alleges facts entitling him to both legal and equitable relief, and demands both, the court may award either that is appropriate to the case made by the proof.²⁶ Nevertheless this equitable power in the courts will not justify them in awarding to the plaintiff, upon a repli-

²¹ *Hale v. Omaha Nat. Bank*, 49 N. Y. 626, Allen, J.

²² *Pittsburgh Mining Co. v. Greenwood*, 39 Cal. 71. See *Miner v. Pearson*, 16 Kans. 27; *Olcott v. Kohlisaat*, 8 N. Y. Supp. 117.

²³ *Marder v. Wright*, 70 Iowa, 42, 29 N. W. Rep. 799; *Humphrey v. Thorn*, 68 Ind. 296, citing 2 Rev. Stat. Ind. (1876)

p. 188, § 880, a clause which appears, however, to have been omitted from the revision of 1888.

²⁴ *Evans v. Schafer* (Ind.), 21 N. E. Rep. 448. And see *Eldridge v. Adams*, 54 Barb. 417.

²⁵ *Chase v. Christianson*, 41 Cal. 258.

²⁶ *Johnson v. Hathorn*, 2 Abb. App. Dec. 465.

cation, an entirely different judgment from that prayed for in his petition.²⁷

§ 142. Judgment must follow the Verdict.

The judgment must follow the verdict, and if the jury have found a verdict for a specified sum of money, the court cannot render judgment for any greater amount; if the verdict is wrong, the remedy is by a new trial.²⁸ Or a judgment entered for a sum in excess of what the verdict authorized may be reformed so as to bring it within the verdict.²⁹ If, on the other hand, the verdict is excessive, being for a greater amount of damages than are laid in the declaration, it is said that judgment may be given only for the amount so laid.³⁰ But this would appear to be adequate ground for a motion in arrest and for new trial; although it would undoubtedly be good practice to enter a *remittitur* for the excess and take judgment for the balance.³¹ According to the practice of the United States courts, the clerk has no authority to enter judgment for any other sum than the verdict and statute (the action being statutory) call for; hence where the statute requires interest to be added to the verdict, the clerk cannot enter a judgment for the amount of the verdict without interest, even though the plaintiff waives the interest.³²

§ 143. Allowance of Credits.

In an action on an obligation for the payment of money, on which credits are indorsed, the judgment should be rendered for the real balance due, deducting the indorsements.³³ But where the judgment on a promissory note, on which there was a payment indorsed, was, by mistake, rendered for the amount of the note apparent on its face, without deducting the payment indorsed, it was held that this did

²⁷ *Marder v. Wright*, 70 Iowa, 42, 29 N. W. Rep. 799.

²⁸ *Buck v. Little*, 24 Miss. 463; *Reid v. Dunklin*, 5 Ala. 205; *Mitchell v. Geisendorff*, 44 Ind. 358.

²⁹ *Stevens' Ex'rs v. Lee*, 70 Tex. 279, 8 S. W. Rep. 40.

³⁰ *Baltzell v. Hickman*, 4 Litt. 265.

³¹ *Walker v. Fuller*, 29 Ark. 448.

³² *Robostelli v. New York, N. H. & H. R. Co.*, 84 Fed. Rep. 507.

³³ *Grays v. Hines*, 4 Muf. 437.

not invalidate the judgment and render void the proceedings under an execution issued thereon, but relief must be afforded to the party injured in some other mode, the court being inclined to think that his appropriate remedy was by application to a court of chancery.³⁴ A mistake of this kind, however, could probably be cured by amendment in the court rendering the judgment. It is also held that payments made pending the suit are to be deducted in making up the judgment.³⁵

§ 144. Tender, Counterclaim, Offer of Compromise.

If a verdict is returned for a sum less than the amount tendered in court, it would be erroneous to render judgment on the verdict and order the residue to be refunded, inasmuch as the tender admits the whole to be due.³⁶ The proper practice in such a case would be to set aside the verdict and enter judgment for the amount tendered, the plaintiff being entitled to that much on the pleadings.³⁷ If the defendant succeeds in establishing a counterclaim, judgment should of course be given in his favor, either for the whole amount or for its excess over the claims proved by the plaintiff, according as the case may be. So a claim for damages for a breach of warranty, interposed by answer to a petition to recover the price of the goods, is in effect a counterclaim, and the court can render judgment for the undisputed portion of the price, and allow the action to proceed as to the sum in dispute.³⁸ An offer of settlement made by the plaintiff before the commencement of the action, will not preclude him from recovering a larger sum than that contemplated by his offer.³⁹

§ 145. Joint Parties.

Embarrassing questions sometimes arise in regard to the amount and character of the judgment in cases where there are numerous

³⁴ *Hathaway v. Hemingway*, 20 Conn. 191.

³⁵ *Joy v. Hull*, 4 Vt. 455, 24 Am. Dec. 625.

³⁶ *Sweetland v. Tuthill*, 54 Ill. 215.

³⁷ *Coffman v. Brown*, 7 Colo. 147, 2 Pac. Rep. 905.

³⁸ *Moore v. Woodside*, 26 Ohio St. 537. And see *Clarkson v. Manson*, 60 How. Pr. 48.

³⁹ *Brush v. Railroad*, 43 Iowa, 554.

parties on one side or the other. And first, in regard to joint plaintiffs, it is the rule that several persons having distinct claims against the same defendant cannot make one suit the vehicle for carrying all their demands into judgment. Their recovery is limited to what concerns them jointly. For instance, all persons whose property is affected by a nuisance, though they own the property in severalty and not jointly, may unite in an action to abate the nuisance; but in such action they cannot have judgment for the damages done to the property of each, but only such relief as is common to all the plaintiffs, *e.g.*, an injunction against the nuisance.⁴⁰ Conversely, one of a class of plaintiffs cannot, in suing alone, procure an adjudication which will be binding upon all, unless the others come in as joint plaintiffs or otherwise connect themselves with the action. Thus, where only one of ten distributees sued the administrator in the probate court, it was held irregular for that court in its judgment, without making the other persons interested parties, to do more than adjudicate the rights of the plaintiff and the administrator.⁴¹ Where proceedings are taken concurrently by several persons against the same fund, it seems they stand on an equal footing. Thus, in a Massachusetts case, where two trustee processes were served at the same time, and judgment was recovered in each for an amount greater than the sum held by the garnishee, it was considered that each of the creditors was entitled to one-half of the fund, though their claims were unequal.⁴² Where several defendants are sued jointly in an action on contract, the rule at common law was that the plaintiff could only recover judgment against all or none of them. But this has been changed by statute in many of the states, so that now, in such an action, a judgment may be rendered in favor of one of the defendants and against the other, if the facts warrant it.⁴³ In equity, a decree between co-defendants, grounded on the pleadings and proofs between the plaintiff and defendants, is regular, and in fact the court is bound to make such a decree in order to avoid a multiplicity of suits.⁴⁴ But at law one defendant to a suit cannot

⁴⁰ Grant v. Schmidt, 22 Minn. 1.

⁴¹ Williams v. Williams, 74 N. Car. 1.

⁴² Davis v. Davis, 2 Cush. 111.

⁴³ *Supra*, §§ 82, 120; Moffitt v. Bickle,

21 Gratt. 280.

⁴⁴ Chamley v. Dusaný, 2 Sch. & Lef. 690, 718.

ordinarily recover a judgment against a co-defendant without a cross-pleading and service of process or an appearance to the cross-pleading by the defendant thereto.⁴⁰ In New Hampshire, damages may be apportioned among several defendants by separate judgments, if justice will be promoted by such procedure.⁴¹

§ 146. Affirmative Relief to Defendant.

In some of the states the code provides that "if a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly."⁴² And aside from statutes of this character, courts possessing equitable powers are disposed to complete the adjudication of controversies brought before them by awarding to defendants any relief justified by the facts. In equity, a decree may be rendered in favor of a defendant where he proves to be the creditor and the plaintiff the debtor.⁴³ So on the foreclosure of a deed of trust, the decree directing the surplus remaining after paying the plaintiff to be paid to the co-defendant, there being no cross-bill, need not find the precise amount due such co-defendant, but only that there is due him more than the surplus.⁴⁴

§ 147. Interest.

Accrued interest on the demand in suit is of course a legal part of the plaintiff's claim and should be included in the judgment. But a judgment for the gross sum of principal and interest made up to a certain day, with interest on such gross sum, is erroneous.⁴⁵ The statutes sometimes require that the debt and the interest shall be separately specified. This being the case, it is erroneous to enter the judgment, in an action of debt, for an aggregate sum, including

⁴⁰ *Cavin v. Williams*, 8 Bush, 848.

⁴¹ *City Sav. Bank v. Whittle*, 68 N. H. 587, 8 Atl. Rep. 645.

⁴² Code Civil Proc. Cal. § 666. See *Gaff v. Hutchinson*, 38 Ind. 341.

⁴³ *Kraker v. Shields*, 20 Gratt. 377.

⁴⁴ *Walker v. Abt*, 83 Ill. 236.

⁴⁵ *Boardman v. Patterson*, 1 Gill, 372.

the debt, interest, and damages, without distinguishing the amount of either.⁵¹ Where, in rendering judgment by default on a demand ascertained by writing, too much interest is calculated and included in the judgment, the error will be corrected on motion, or it may be amended in the appellate court at the cost of the plaintiff in error.⁵² It is immaterial that the judgment recites that the money recoverable bears interest from an erroneous date, where it appears that the amount, with interest, for which judgment is rendered does not exceed the amount for which the party complaining is legally liable.⁵³

§ 148. Conditions as to Payment.

In certain classes of cases it is customary for the judgment to contain conditions or directions as to the time or manner of payment. Thus a judgment, directed by the court, in an action upon a contract for the sale and purchase of lands, which ascertains the amounts which will become due to the plaintiff, for principal and interest, at the several times stipulated in the contract, may further direct that, in case the same should at those periods remain unpaid, the plaintiff shall have judgments for their recovery and executions for their collection.⁵⁴ So a judgment on a bond for the payment of a debt by instalments should be for the debt in the declaration mentioned, to be discharged by payment of the sum due at the time of suit brought, reserving liberty to the plaintiff to resort to *scire facias* to recover such other damages as might thereafter arise upon the condition of the bond.⁵⁵ Again, in an action of covenant upon a guaranty by which the covenantor became surety for the punctual payment of the bond of another, and undertook that if the obligor made default, he would pay the mortgage mentioned in the bond, the judgment upon such default should not be that he should pay absolutely to the plain-

⁵¹ *Willmans v. Bank*, 1 Gilm. 667.

⁵² *Spence v. Rutledge*, 11 Ala. 590. But it is held by the Supreme Court of the United States that the objection that too large an amount of interest has been included in a judgment cannot be raised for the first time in that

court. *Hawkins v. Glenn*, 181 U. S. 819, 9 Sup. Ct. Rep. 739.

⁵³ *Deen v. Blount* (Tex.), 9 S. W. Rep. 168.

⁵⁴ *Libby v. Rosecrans*, 55 Barb. 202.

⁵⁵ *Thatcher v. Taylor*, 3 Munt. 249.

tiff the amount due, but that he should pay or cause to be paid and satisfied of record the mortgage mentioned, within thirty days from the date of the judgment, or, in the event of his not doing so, then that he pay the amount to the plaintiff.⁶⁶

§ 149. Statutory Damages.

Where a statute imposes a penalty for the commission or omission of a certain act, the judgment, if for the plaintiff, must be for the full amount of the penalty; the courts have no power to mitigate it, for in so doing they would contravene the expressed legislative will.⁶⁷ In cases where the statutes give double or treble damages for a certain kind of injury, the jury, if they find for the plaintiff, should increase the damages which they find by the statutory multiple; but if the verdict in terms finds only single damages, the court will perform the multiplication and direct judgment to be entered for the increased amount.⁶⁸ Under a declaration containing a count for a common law trespass and a count for the statutory trespass, where a general verdict of guilty is returned, it is not competent for the court to apply the verdict to the count under the statute, and proceed to render judgment for treble the damages returned.⁶⁹

§ 150. Designation of Amount.

The amount of a judgment must be stated in it with certainty and precision; an incurable ambiguity in this respect will be sufficient to invalidate the judgment. But the judgment is to be construed with reference to the pleadings and other parts of the record, and if these furnish data from which the amount of the recovery can be ascertained with certainty, it is probably sufficient. All judgments ren-

⁶⁶ *Farnham v. Mallory*, 2 Abb. App. Dec. 100.

⁶⁷ *Powell v. Redfield*, 4 Blatchf. 47; *United States v. Montell*, Taney, 47; *Clarke v. Barnard*, 108 U. S. 486, 2 Sup. Ct. Rep. 878.

⁶⁸ *Palmer v. York Bank*, 18 Me. 166;

Royse v. May, 93 Pa. St. 454; *Shrewsbury v. Bawtlitz*, 57 Mo. 414; *Osborn v. Lovell*, 86 Mich. 246; *Chipman v. Emrick*, 5 Cal. 289; *Sedgwick on Damages*, 588.

⁶⁹ *Osborn v. Lovell*, 86 Mich. 246.

dered in this country should also be expressed in the American denominations of money; and the amount should be written out, or at least, if expressed in figures, should be accompanied by some appropriate mark or sign to indicate what denominations of money are meant.⁶⁰

§ 151. Judgment designating Medium of Payment.

As a general rule, a judgment, being merely the sentence of the law upon the facts shown by the pleadings and proof, has nothing to do with the means or the medium of satisfying the debt which it establishes. Hence, where a suit is for a money demand, the court has no power (with exceptions to be noted in the next section), after giving judgment for the amount claimed, to specify in what kind of money it shall be paid; when the plaintiff is entitled to a judgment, the law determines how it shall be satisfied.⁶¹ But where a promissory note was made payable "in the currency of the country but not in Confederate notes," it was held that the recovery should be for such notes as were actually in circulation at the maturity of the note, although greatly depreciated in value.⁶²

§ 152. Judgment for Coined Money.

When the Legal Tender Act (Act Congr. Feb. 25, 1862) first came before the supreme federal tribunal for interpretation, it was held to be unconstitutional. The court ruled that in respect to contracts which were expressed to be payable in gold or silver coin or in "specie," the act could have no application, whether such contracts were made before or after its passage; that such contracts could not be satisfied by a tender in treasury notes; and that when a contract so worded was put in suit, the judgment rendered upon it should specify coined dollars and parts of dollars as the medium of its satisfaction.⁶³ Notwithstanding this decision, some of the cases, refusing to accept this construction of the act, or preferring to abide by the

⁶⁰ *Supra*, § 118.

⁶¹ *Swain v. Smith*, 65 N. Car. 211.

⁶² *Coffin v. Hill*, 1 Helsk. 885.

⁶³ *Bronson v. Rhodes*, 7 Wall. 245; 8 Wall. 604.

Butler v. Horwitz, 7 Wall. 259; *Dewing v. Sears*, 11 Wall. 379; *Treblsack v. Wilson*, 12 Wall. 687; *Hepburn v. Griswold*,

rule that the courts have nothing to do with the manner in which a judgment or execution shall be satisfied, held that it would be entirely erroneous to enter judgment for a particular kind of money.⁶⁴ But in a majority of the states the courts followed the lead of the federal decisions, and maintained the rule that if the contract specified gold or silver as its medium of payment, the judgment upon it must do likewise.⁶⁵ It was also held that if the contract was only solvable in coin it would be improper to render judgment for the market value of that amount of coin calculated in terms of the treasury notes; the judgment must simply be for so much gold or silver.⁶⁶ Also it was considered that interest on the debt could only be paid in coined money.⁶⁷ But the costs of the action might be paid in legal tender notes.⁶⁸ However, it was only in respect to contracts expressly stipulating for payment in coin that judgments for coin could be entered. In suits for unliquidated damages, such judgments were not permissible.⁶⁹ Nor could they be rendered in actions of tort.⁷⁰ So a person who deposited gold with a banker was only

⁶⁴ *Davis v. Field*, 43 Vt. 231; *Munter v. Rogers*, 50 Ala. 233; *Windisch v. Gussett*, 30 Tex. 744; *Flournoy v. Healy*, 31 Tex. 590; *Olanyer v. Blanchard*, 18 La. Ann. 616; *Whetstone v. Colley*, 36 Ill. 326; *Burling v. Goodman*, 1 Nev. 314; *Buchegger v. Schultz*, 13 Mich. 420; *Wood v. Bullens*, 6 Allen, 518; *Killough v. Alford*, 33 Tex. 457; *Reed v. Eldredge*, 37 Cal. 343.

⁶⁵ *Independent Ins. Co. v. Thomas*, 104 Mass. 193; *Paddock v. Ins. Co.*, 104 Mass. 521; *Chrysler v. Renois*, 43 N. Y. 209; *Kellogg v. Sweeney*, 46 N. Y. 291; *Ransford v. Marvin*, 8 Abb. Pr. N. S. 433; *McCalla v. Ely*, 64 Pa. St. 254; *Chesapeake Bank v. Swain*, 29 Md. 433; *Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66; *Foster v. Railroad*, 1 Mo. App. 390; *Harding v. Cowing*, 28 Cal. 212; *Reese v. Stearns*, 29 Cal. 273; *Wimans v. Hassey*, 43 Cal. 634; *McGoon v. Shirk*, 54 Ill. 408; *Hittson v. Davenport*, 4 Colo. 169; *Smith v. Wood*, 37 Tex. 620.

⁶⁶ *Dewing v. Sears*, 11 Wall. 379; *Da-*

vis v. Mason, 3 Oreg. 154; *Foster v. Railroad*, 1 Mo. App. 390; *Phillips v. Dugan*, 21 Ohio St. 466. In an action on a promissory note made payable in gold, a judgment was rendered for the face of the note and interest thereon, together with 40 per cent. on account of the depreciation of the currency. It was held, that this was error, whether the act making treasury notes a legal tender is constitutional or not. In the first case, the currency and gold are of equal value before the law. In the second case, the plaintiff has the right to refuse the notes, no matter in what quantity offered, and to demand payment of his debt in gold. *Henderson v. McPike*, 35 Mo. 255.

⁶⁷ *Chesapeake Bank v. Swain*, 29 Md. 433; *Chrysler v. Renois*, 43 N. Y. 209.

⁶⁸ *Phillips v. Dugan*, 21 Ohio St. 466; *Chrysler v. Renois*, 43 N. Y. 209.

⁶⁹ *Calhoun v. Pace*, 37 Tex. 454.

⁷⁰ *Livingston v. Morgan*, 53 Cal. 23. Where there is no allegation in the complaint that there was an agreement to

entitled to recover the amount in dollars and cents in the circulating medium of the country.⁷¹ But a judgment on a promissory note expressed to be payable "in gold coin or its equivalent in United States legal tender notes," rendered simply for gold coin, would be erroneous. The judgment should follow the contract, fixing the amount to be paid if paid in gold, and the amount to be paid if paid in legal tender notes.⁷² A condition in a note expressed to be payable in gold coin, that "if it is paid at maturity or before suit brought, it shall be payable in lawful money," does not impair the right, in case it is necessary to bring suit, to recover judgment in gold coin.⁷³

At a later period, the United States Supreme Court reversed their former rulings on the legal tender acts, and pronounced those statutes valid and constitutional and applicable to all species of contracts.⁷⁴ This reconsideration of the former decisions does not affect existing judgments of the state courts or require a modification or change of their records.⁷⁵ But it renders it useless, for the future, to specify in any judgment how it shall be paid; since, whatever the judgment may declare, it is solvable in legal tender notes. Hence if a jury should now assess the damages for the plaintiff in gold coin, the court may disregard so much of the verdict as relates to coin and enter a judgment which does not specify any particular kind of money.⁷⁶

pay in gold coin, the court cannot render a judgment payable in gold coin, even if the verdict of the jury is for gold. The verdict cannot go beyond the issues in the case. *Watson v. Railroad*, 50 Cal. 523.

⁷¹ *Gumbel v. Abrahms*, 20 La. Ann. 568, 96 Am. Dec. 426.

⁷² *Wells v. Van Sickle*, 6 Nev. 45.

⁷³ *Churchman v. Martin*, 54 Ind. 380.

⁷⁴ *Legal Tender Cases*, 12 Wall. 457; *Julliard v. Greenman*, 110 U. S. 421, 4 Sup. Ct. Rep. 123.

⁷⁵ *Miller v. Tyler*, 58 N. Y. 477.

⁷⁶ *Chamberlin v. Vance*, 51 Cal. 75.

CHAPTER IX.**THE AMENDMENT OF JUDGMENTS.**

- § 153. Amendment during the Term.
- 154. Amendment after the Term.
- 155. Correction of Clerical Errors.
- 156. Supplying Omissions.
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§ 153. Amendment during the Term.

A judgment may be incorrect, imperfect, or erroneous, and therefore stand in need of revision or amendment, from either of two causes; that is, either because the entry fails to correspond with the judgment actually intended to be given, in consequence of some omission, mistake, or inadvertence; or because the judgment actually rendered was one that ought not to have been given, the error being due to misinformation or a wrong apprehension of the law. The principles of justice obviously require that what has been done amiss should be set right. But in order to secure stability to the formal and solemn records of the courts, the rules of practice have established important limitations upon the power of a court to correct or revise its own sentences. These limitations rest mainly upon a distinction which originated in the common law, and was there considered of the greatest consequence. During the whole of the term

in which any judicial act was done the proceedings were considered to continue *in fieri*, and even after a judgment was rendered, the record was said to remain "in the breast of the judges of the court and in their remembrance," and therefore the judgment was subject to such amendment or alteration as they might direct. But after the term had passed, the record no longer remained in this nebulous condition. It was then spread at large upon the judgment-roll, and thereupon acquired an inalterable and indisputable character, passed beyond the control of the court, and admitted of no alteration, modification, or contradiction.¹ The distinction between power to act during the term and power to act after the term has survived in many points of modern practice. And in regard to the *first* part of the common law rule, as above stated, there can be no doubt that it still stands as sound law. The authorities all hold that a court has plenary control of its judgments, orders, and decrees during the term at which they are rendered, and may amend, correct, modify, or supplement them, for cause appearing, or may, to promote justice, revise, supersede, revoke, or vacate them, as may in its discretion seem necessary.² Thus an order of record setting aside a verdict may be corrected by the court at any time during the term at which it was rendered.³ And the court may allow a judgment to be amended as to the name of a member of a firm, so as to correctly describe the firm against which the judgment is given.⁴ Nor is it only in respect to clerical misprisions or omissions that this power of amendment during the term may be exercised; it also extends to the errors of the court. Thus, where a court makes an erroneous order under a mistaken view of the law, it may, during the term, of its own motion, correct the mistake by expunging such order and entering an order in accordance with the law of

¹ Co. Litt. 280a; 8 Bl. Comm. 407.

² Barrell v. Tilton, 119 U. S. 687, 7 Sup. Ct. Rep. 332; Alabama Ins. Co. v. Nichols, 109 U. S. 232, 8 Sup. Ct. Rep. 120; Memphis v. Brown,¹ 94 U. S. 715; Tilton v. Barrell, 17 Fed. Rep. 59; Burch v. Scott, 1 Bland Ch. 112; Lemacks v. Glover, 1 Rich. Ch. 141; Worthington v. Campbell (Ky.), 1 S. W. Rep. 714;

Lane v. Ellinger, 32 Tex. 369; Richardson v. Howk, 45 Ind. 451; Stahl v. Webster, 11 Ill. 511; Becker v. Sauter, 89 Ill. 596; Harris v. State (Nebr.), 40 N. W. Rep. 317; De Castro v. Richardson, 25 Cal. 49.

³ Dawson v. Wisner, 11 Iowa, 6.

⁴ Sugg v. Thornton (Tex.), 9 S. W. Rep. 145.

the case.⁵ So a final decree which is incorrect in regard to an item of costs, which error was caused by the court's not being correctly informed, will be corrected in that particular on motion made during the term.⁶ Again, where a receiver has been ordered, by mistake, before a final settlement, to pay out more money than is liable to come into his hands as such receiver, the order may be amended and modified, either upon direct and summary proceedings, or by the court upon its own motion.⁷ It is even held that the court, in a criminal action, may set aside a judgment made in regular course, imposing on the defendant a fine and the costs of the proceedings, during the same term in which the judgment was rendered, and before any part of it has been performed, and may impose a greater fine than was imposed by the first judgment.⁸

§ 154. Amendment after the Term.

That part of the common law rule which declares that no judgment can be amended after the term at which it was rendered, can scarcely be said to survive, in this country, in all its original inflexibility. Divided between the policy of administering justice liberally and equitably and the habit of ascribing the utmost sanctity to a record once completed, the courts have suffered exceptions to be introduced which are of such importance as to require the rule to be much modified before it will apply to contemporary practice. A conservative statement of the rule as at present observed, and one fully supported by the authorities, would be as follows: After the expiration of the term at which a judgment or decree was rendered, it is out of the power of the court to amend it in any matter of *substance* or in any matter affecting the *merits*.⁹ It is said by the

⁵ *Wolmerstadt v. Jacobs*, 61 Iowa, 872, 16 N. W. Rep. 217.

⁶ *Bishop v. Aborn* (R. L.), 18 Atl. Rep. 208.

⁷ *Ryon v. Thomas*, 104 Ind. 59, 3 N. E. Rep. 658.

⁸ *State v. Daugherty*, 70 Iowa, 439, 30 N. W. Rep. 685.

⁹ *Harrison v. State*, 10 Mo. 686; *Bot-*

kin v. Commissioners, 1 Ohio, 875, 18 Am. Dec. 680; *Bramblet v. Pickett*, 2 A. K. Marsh. 10, 12 Am. Dec. 350; *Becker v. Sauter*, 89 Ill. 596; *Humphreyville v. Culver*, 73 Ill. 485; *Smith v. Armstrong*, 25 Wis. 517; *Clark v. Lary*, 3 Sneed, 77; *Cook v. Wood*, 24 Ill. 295; *Balis v. Wilson*, 12 Mart. (La.) 358, 13 Am. Dec. 376; *McLean v. Stewart*, 21

supreme court of Illinois, "The general rule is that courts, while a cause is pending and the parties before them, have control over the record and proceedings in the cause, and that they have jurisdiction over their judgments and final orders of a pending term, and may, during the term or while the cause is depending, and the parties in court, for cause appearing, amend or set them aside. But after the expiration of the term, unless the cause is still depending and the parties are in court, their power over the record is confined to errors and mistakes of their officers; and these may at any time, upon notice to the parties in interest, and saving such rights as in the interval of time may have accrued to third persons, be corrected so as to make the record conform to the action or judgment of the court."¹⁰ In the following sections we shall endeavor to show that, beside the correction of clerical errors, the courts have power, after the term, to supply omissions in a judgment, and to reform and perfect it, so as to make it conform exactly to the judgment intended to be given in the case; but that they cannot use the power of amendment to correct *judicial* errors or to enter a judgment which was neither in fact rendered nor intended to be rendered. Taken with these corollaries, the rule as above stated will be found to express the common opinion of the authorities on this point at the present time.

In illustration of the rule, the following decisions may be cited. Where the court had fully disposed of a cause upon the pleadings and evidence and rendered judgment thereon, it was held that the judge had no power, after the adjournment of the term, to render another and different judgment upon the same record, without further pleadings, suggestions, or evidence; any such second judgment was a mere nullity.¹¹ So after a judgment was rendered and the court had adjourned, it was considered that an error therein could not be cured by the entry of a *remittitur* of an excess of damages.¹² A recent Virginia case holds that a decree for alimony, affirmed on appeal as to

N. Y. Superior Ct. 472; Davless County Court v. Howard, 18 Bush, 101; Ocoee Bank v. Hughes, 2 Cold. 52; Killpatrick v. Rose, 9 Johns. 78; Coughran v. Gutcheus, 18 Ill. 390.

¹⁰ Coughran v. Gutcheus, 18 Ill. 390, Skinner, J.

¹¹ Bethel v. Bethel, 6 Bush, 65, 99 Am. Dec. 655.

¹² Buckles v. Bank, 63 Ill. 268.

the date at which payments should commence, is final, and when, in subsequent proceedings in the trial court to ascertain its amount, payment is fixed as beginning at a different date, such action is erroneous and will be reversed.¹³ In California, the court has no power to amend an order made at a previous term, unless a motion was made or some proceedings instituted at such term to procure the amendment to be made and the motions or proceedings were continued, or unless the record discloses that the order as entered was not the one made by the court.¹⁴ It follows also that a judgment cannot be *expunged* at a term subsequent to that of its rendition, on the ground that neither the judge's docket nor the clerk's minutes show the rendition thereof. In such case the record of the judgment imports absolute verity and cannot be assailed for the lack of such vouchers.¹⁵ But the rule that the court has no power over its judgments after the expiration of the term, applies only to *final* judgments, not to judgments which are still *in fieri*, as an order for a partition.¹⁶

§ 155. Correction of Clerical Errors.

As regards mere clerical errors, mistakes arising from inadvertence, or formal misprisions of clerks or other officers, it is always in the power of the court, even after the adjournment of the term, to make such corrections or amendments as truth requires.¹⁷ Hence a mistake in entering a decree, which is manifestly a clerical error, which cannot mislead, and which does not prejudice the appellant, is no ground for reversal.¹⁸ A court may, upon motion of one party and

¹³ *Cralle v. Cralle*, 84 Va. 198, 6 S. E. Rep. 12.

¹⁴ *De Castro v. Richardson*, 25 Cal. 49.

¹⁵ *Jones v. Hart*, 60 Mo. 351.

¹⁶ *Hastings v. Cunningham*, 35 Cal. 549.

¹⁷ *Balch v. Shaw*, 7 Cush. 282; *Fay v. Wenzell*, 8 Cush. 815; *Wilson v. Myers*, 4 Hawks, 73, 15 Am. Dec. 510; *Speed's Exrs. v. Hann*, 1 T. B. Mon. 16, 15 Am. Dec. 78; *Smith v. Mullins*, 3 Met. (Ky.) 182; *Brady v. Beason*, 6 Ired. 425; *Portis v. Talbot*, 33 Ark. 218; *Russell v. Ir-*

win, 41 Ala. 292; *Johnson v. Bank*, 2 Duvall, 521; *Hammer v. McConnell*, 2 Ohio, 81; *Ohio v. Beam*, 3 Ohio St. 508; *Silner v. Butterfield*, 2 Ind. 24; *Sherman v. Nixon*, 37 Ind. 153; *Jenkins v. Long*, 28 Ind. 460; *Smith v. Wilson*, 26 Ill. 186; *Hickman v. Barnes*, 1 Mo. 156; *State v. Primm*, 61 Mo. 166; *Swain v. Naglee*, 19 Cal. 127; *Will v. Sinkwitz*, 41 Cal. 588; *Dreyfuss v. Tompkins*, 67 Cal. 339, 7 Pac. Rep. 732.

¹⁸ *Eau Claire Lumber Co. v. Anderson*, 18 Mo. App. 429.

due notice to the other, amend a docket entry by inserting the true date of the rendition of the judgment, where a wrong date appears of record.¹⁹ So a misnomer of the term of the court in the entry of a judgment is a clerical error and amendable.²⁰ A judgment entered against the defendant as executor or administrator, instead of against the goods of the estate, may be amended by another part of the record upon motion, as the mistake plainly arises from the misprision of the clerk.²¹ So where it is shown, on a motion to correct the entry of a judgment of dismissal of an action as to a party thereto, that the order of dismissal was not intended or understood by either party to include a dismissal of the cause of action against such party, the error being a clerical misprision, the entry may be corrected.²² In Alabama the circuit courts have authority, under the laws of the state, to amend a judgment at any time within three years after its rendition, by the correction of any clerical error or mistake, where there is sufficient matter apparent on the record to amend by.²³

§ 156. Supplying Omissions.

In regard to the power of amending judgments by supplying omissions, it is necessary not to lose sight of the principle that amendments can only be allowed for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment. Hence if anything has been omitted from the judgment which is necessarily or properly a part of it, and which was intended and understood to be a part of it, but failed to be incorporated in it through the negligence or inadvertence of the court or the clerk, then

¹⁹ Grimes v. Grosjean (Nebr.), 40 N. W. Rep. 187; Carlton v. Patterson, 29 N. H. 580.

²⁰ Burnham v. Chicago, 24 Ill. 496.

²¹ Atkins v. Sawyer, 1 Pick. 351, 11 Am. Dec. 188; Yarborough v. Scott, 5 Ala. 221; Speed's Exrs. v. Hann, 1 T. B. Mon. 16, 15 Am. Dec. 78. "The change of the judgment, by amendment, from a judgment against the plaintiff personally to one against her *de bonis testatoris*, was one which it was compe-

tent for the court to make. The object was to correct a mistake in the original entry, so as to conform the record to the judgment which was in fact pronounced, and not to change such judgment. Such corrections may always be made." Wyman v. Buckstaff, 24 Wis. 477.

²² Stuart v. Logansport, 87 Ind. 534.

²³ Lee v. Houston, 20 Ala. 301; Code of Ala. 1886, § 2836.

the omission may be supplied by an amendment after the term.²⁶ If, on the other hand, the proposed addition is a mere afterthought, and formed no part of the judgment as originally intended and pronounced, it cannot be brought in by way of amendment. For example, in the entry of a final judgment against a garnishee, it is the duty of the clerk to recite the fact and the amount of the original judgment against the defendant, but his failure to do so is a clerical error which may be corrected *nunc pro tunc* at a subsequent term.²⁷ So a judgment in favor of A. "administrator" may be amended so as to show that it was recovered by A. as administrator of B., deceased.²⁸ The omission of the clerk's signature to a judgment filed and docketed, where that is required, may be supplied in like manner.²⁷ And the power of ordering amendments of this character extends as well to other parts of the record as to the judgment itself. Thus, when the court had in fact jurisdiction of the defendant, but the return of the constable failed to show that fact, the record may be amended after judgment so as to show jurisdiction, if there are no intervening rights to be affected.²⁹ So where the Christian name of an appraiser was omitted in drawing up a decree for the appraisal and sale of trust property, the court directed it to be inserted in the original decree in the register's minutes, it being a merely formal matter.³⁰ Again, where a guardian *ad litem* was appointed at the proper term, but no entry made on the docket, the entry may be subsequently supplied.³⁰ And in another case, where the omission occurred through the inadvertence of the plaintiff's attorney, and it was necessary that it should be supplied in order to perfect the record, although it would not vary the judgment, the

²⁶ *Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49; *State v. Moran*, 24 Nebr. 108, 38 N. W. Rep. 29; *Galloway v. McKeithen*, 5 Ired. 12, 18 Am. Dec. 158; *Gaines v. Wedgeworth*, 19 Ga. 81; *Reid v. Morton*, 119 Ill. 118, 6 N. E. Rep. 414; *Thorp v. Platt*, 84 Iowa, 814; *Trammell v. Trammell*, 25 Tex. Supp. 261; *Rogers v. Rogers*, 1 Paige, 188; *Bank v. Seymour*, 14 Johns. 219; *Gardner v. Dering*, 2 Edw. Ch. 181; *Ray v. Connor*, 3 Edw. Ch. 478.

²⁷ *Whorley v. Memphis & Charleston R. Co.*, 73 Ala. 20.

²⁸ *Crane v. Crane* (Ark.), 11 S. W. Rep. 1.

²⁹ *Seaman v. Drake*, 1 Caines, 9.

³⁰ *Allison v. Thomas*, 72 Cal. 562, 14 Pac. Rep. 309. And see *Fawcett v. Vary*, 59 N. Y. 597.

³¹ *De Caters v. De Chaumont*, 3 Paige, 178.

³² *Johnson v. Wright*, 27 Ga. 555.

learned judge, in allowing the amendment, said: "I cannot discover any difference, as to the allowing of an amendment, whether the mistake has happened through the omission of an attorney or by that of the clerk. Both are equally officers of the court."²¹ But on the other hand, as already stated, the power of amendment cannot be made the means of adding to a judgment or decree something not originally contemplated by it or which is foreign to its intended scope and purpose. Thus, in an Illinois case, it appeared that a decree had been drawn up by the plaintiff's solicitor and accepted and signed by the judge as the decree of the court; afterwards it was discovered that the solicitor had omitted from the decree a clause which he had intended to make a part of it, and application was made to have it added. But it was considered to be no proper case for an amendment, inasmuch as it did not appear that *the court* had intended to insert the clause in question, and consequently to add it by amendment would be to change the sentence pronounced and revise its own decree.²²

§ 157. Reforming and Perfecting the Judgment.

A judgment entry may be amended at any time to make it correspond with the judgment actually rendered.²³ And for this purpose either additions or elisions may be made. In a case where the judgment pronounced by the court upon motion of the defendant was "that the complaint be dismissed with costs," and the judgment entered by the clerk was that the complaint be dismissed "upon the merits" with costs to the defendant, it was held that the insertion of the words quoted was a material addition to the judgment which the clerk had no authority to make, and was properly stricken out on motion.²⁴ This power may also be used to clear up ambiguities. Thus it is

²¹ Close v. Gillespey, 8 Johns. 526.

²² Forquer v. Forquer, 19 Ill. 68.

²³ Gilmer v. Grand Rapids, 16 Fed. Rep. 708; Capen v. Stoughton, 16 Gray, 364; Portis v. Talbot, 33 Ark. 218. Where the record stated that the continuance was set aside, but from other

expressions in the order, and other proceedings in the cause, it was manifest that it was a judgment by default that was set aside, it was held to be amendable. Sharpe v. Fowler, 6 Litt. 446.

²⁴ Williams v. Hayes, 68 Wis. 348, 33 N. W. Rep. 44.

held that the court has power to amend a judgment for a specified quantity of water, "miners' measurement," so as to relieve it of the uncertainty of that term, the amendment being made on the uncontradicted testimony in the case, made a part of the motion papers. The court remarked: "We do not doubt the soundness of the rule that the trial court cannot at a subsequent time so modify a judgment that the modification is in effect a reversal. That is the province of the appellate court. But the trial court has the power to modify or correct the judgment or record to such an extent that the relief granted may be such as was intended to be granted."²⁵ On similar principles, the court may amend its record by transferring the proceedings to the proper suit when by mistake they have been filed in a suit to which they do not belong.²⁶ In this connection, the following observations of the court in North Carolina will be found instructive. "As a general rule, it is unquestionably true that no act of the court, as contradistinguished from the act of its officers or of the parties, can be allowed to be amended, but during the term at which it was done. During the term the record is said to be in the breast of the judge; after it is over it is upon the roll. But this rule applies to such amendments as call into action the judgment or discretion of the court, and not to such as are a matter of course. In such cases, the reasons of the rule no longer operate; for, as much as the law confides in the integrity of the court, it admits a possibility of its being corrupt, and therefore guards it from temptation."²⁷ It is held that a judgment by *consent* cannot be corrected by the court without the consent of all parties to it. It is not the judgment of the court except in the sense that it is recorded and has the effect of a judgment. In such case, the court can only correct its own errors in making the entries, as, for instance, the misprision of its clerk.²⁸

²⁵ Welch v. Keene (Mont.), 21 Pac. Rep. 25.

²⁶ Sweeny v. Delany, 1 Pa. St. 320, 44 Am. Dec. 136.

²⁷ Wilson v. Myers, 4 Hawks, 73, 15 Am. Dec. 510.

²⁸ McEachern v. Kerchner, 90 N. Car. 177. And see Knox v. Moser, 72 Iowa, 154, 33 N. W. Rep. 617.

§ 158. Judicial Errors not to be thus Corrected.

The allowance of an amendment should never be used by the court as a means of reviewing its judgments on the merits, or correcting its own judicial mistakes, or substituting a judgment which it neither in fact rendered nor intended to render.³⁹ "The power of courts to amend judgments after the close of the term extends to all omissions to enter the judgments pronounced by the court, and to clerical errors in the form of the entry, whether by introducing a fact which ought to appear on the record, or by striking out a statement of a fact improperly introduced, and when the record affords sufficient evidence. But when the defect consists in the failure of the court to render the proper judgment, or arises from a want of judicial action, the record cannot be corrected after the term has closed, the cause being no longer *sub judice*. The purpose of amendment is to make the judgment conform to what the court intended it should be, to set right the record and make it speak the truth, so that omissions or clerical errors shall not prejudice parties litigant. The power to amend *nunc pro tunc* is not revisory in its nature, and is not intended to correct *judicial* errors. Such amendments 'ought never to be the means of modifying or enlarging the judgment, or the judgment record, so that it shall express something which the court did not pronounce, even although the proposed amendment embraces matter which ought clearly to have been pronounced.' However erroneous, the express judgment of the court cannot be corrected at a subsequent term."⁴⁰ A judgment granting a divorce and making distribution of property is final; and a modification thereof, by incumbering land given to plaintiff with a lien for the payment of a sum to defendant, and providing for a sale of the land unless the plaintiff mortgages it to a trustee to secure the sum, made more than a year after its rendition, is without jurisdiction and void.⁴¹

³⁹ Durning v. Burkhardt, 84 Wis. 585; Pinger v. Vanclick, 86 Wis. 141; Duffey v. Houtz, 105 Pa. St. 96; Turner v. Christy, 50 Mo. 145; Milam Co. v. Robertson, 47 Tex. 222.

⁴⁰ Browder v. Faulkner, 82 Ala. 257, 8

South. Rep. 80, citing Whorley v. Railroad, 73 Ala. 20; Emerson v. Head, 81 Ala. 443, 1 South. Rep. 197; Freeman Judgm. § 70.

⁴¹ Thompson v. Thompson (Wis.), 40 N. W. Rep. 671.

§ 159. Amendment as to Amount of Judgment.

If there has been obvious error on the part of the clerk of the court in the entry of the amount recovered by a judgment, the entry may be amended to conform to the truth.⁴³ Thus if, through an error of the clerk, a judgment by default has been entered for a sum too small, as appears on the face of the papers, the judgment may be corrected on motion at a subsequent term, even although the amount for which it was erroneously entered has been paid.⁴⁴ Relief of this kind was administered in an early New York case, where the power seems to have been pushed to its extreme limit. It appeared that after interlocutory judgment in an action against an indorser, the clerk of the court made a mistake in the assessment of the damages, by calculating the interest for one year less than the actual time, and the plaintiff's attorney, without observing the mistake, filed the report of the assessment and entered final judgment thereon, and on receiving payment of the amount of damages and costs, according to such assessment, acknowledged satisfaction of the judgment, which was entered of record; but afterwards, on paying over the money to the plaintiff, the mistake was discovered, but the defendant refused to rectify it. On this state of facts, the court, on motion for that purpose, ordered the entry of satisfaction of the judgment and all proceedings in the cause subsequent to the interlocutory judgment to be vacated, and the report of the clerk of the assessment of damages, the record of the judgment, and the satisfaction thereof, to be taken off the files of the court and cancelled, and the damages to be reassessed by the clerk, allowing the defendant credit for the amount paid by him.⁴⁴

If the clerk, without authority, enters judgment in excess of the verdict, with interest from the time the entry was made, in this case also the judgment should be modified, so that the amount may cor-

⁴³ *Arrington v. Conrey*, 17 Ark. 100; *Smith v. Hood*, 25 Pa. St. 218, 64 Am. Dec. 692; *Wall v. Covington*, 88 N. Car. 144; *Daniels v. McGinnis*, 97 Ind. 549; *Sherry v. Priest*, 57 Ala. 410; *Modawell*

v. Hudson, 57 Ala. 75; *Miller v. Royce*, 60 Ind. 189.

⁴⁴ *Sherman v. Nixon*, 87 Ind. 158.

⁴⁴ *Mechanic's Bank v. Minthorne*, 19 Johns. 244.

respond with the verdict and the interest run from the date of the verdict.⁴⁸ So if a judgment is rendered for a sum greater than the amount of the plaintiff's claim, it may be corrected on motion.⁴⁹ The same rule applies also if there is a manifest fault in the verdict itself. Thus if the jury bring in a verdict for a sum which is less than that admitted to be due on the face of the pleadings, the judgment, if entered according to the verdict, may afterwards be reformed.⁵⁰ Again, in an action of debt, where the judgment was erroneously entered for damages alone, it was held that the defendant in error might, on application to the court in which the judgment was rendered, amend the entry so as to make it a judgment for the debt in the declaration mentioned, to be discharged on payment of the damages found by the jury.⁵¹ And in an English case, the record in a penal action, where the jury by mistake gave damages, being carried by writ of error to the King's Bench, it was held that the plaintiff might enter a *remittitur* of the damages on the record, and the transcript might be made conformable thereto.⁵²

§ 160. Amendment in Respect of Parties.

If the entry of a judgment is open to objection because the parties are incorrectly named or erroneously described in it, it may be amended on motion so as to conform to the other parts of the record.⁵³ This is also true if the entry, in this respect, is not sufficiently definite or precise. Thus, where a judgment as first entered was defective in not designating the defendants who were personally liable for the debt, but the record showed who they were, it was held that the court had power to amend the judgment at any time by adding a clause specifying the defendants so liable.⁵⁴ Also, if the judgment is irregular, as embracing more parties than the record justifies, it is proper practice to correct the judgment in the trial

⁴⁸ *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. Rep. 708.

⁴⁹ *Dunn v. Tillotson*, 9 Port. 272; *Smith v. Robinson*, 11 Ala. 270.

⁵⁰ *Brown v. Lawler*, 21 Minn. 827.

⁵¹ *O'Conner v. Mullen*, 11 Ill. 57.

⁵² *Hardy v. Cathcart*, 1 Marsh. 180.

⁵³ *Wright v. McBride*, 42 Ga. 234; *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; *Shelly v. Dobbins*, 31 La. Ann. 530.

⁵⁴ *Leviston v. Swan*, 33 Cal. 480.

court.⁵³ Thus if process issues against two defendants, and one only is served, and the pleadings are against that one, but verdict and judgment against both, the entry may be amended at a subsequent term by striking out the name of the defendant not served.⁵⁴ So where a firm consisting of three partners was sued, and one accepted service and appeared for all, and judgment went against the three individually, and the two defendants not served then moved for a new trial on the ground that the other had no authority to appear or plead for them, it was held to be in the discretion of the court to reform the judgment, so as to award execution against the firm and against the individual property of the partner served, instead of granting a new trial.⁵⁴ Again, where a judgment is rendered against several defendants, one of whom dies previous to its rendition, it may be amended, on motion, by vacating it as to the deceased defendant and continuing its vitality as against the others.⁵⁵ If a judgment may be corrected by striking out the name of a party improperly inserted in it, so also may it be amended, after the term, by inserting the name of one of the parties, omitted through mistake, when there is sufficient record evidence by which to make the correction.⁵⁶ But if a suit is brought in the name of A. "and others," it is held that the record cannot be amended by striking out the word "others" and inserting the name of another party, more especially when the cause had previously been referred to arbitrators, from whose award there had been an appeal.⁵⁷ Nor has the court power to modify its own judgment, rendered at a former term, by changing it from a judgment against the plaintiff (who brought the suit, in his official capacity, upon an assignee's bond) to a judgment against the person for whose benefit the suit was brought.⁵⁸ But in another case, where, by mis-

⁵³ *Mulliken v. Hull*, 5 Cal. 245.

⁵⁴ *Hammer v. McConnel*, 2 Ohio, 82; *Leman v. Young*, 14 Ind. 8; *People's Bank v. McArthur*, 82 N. Car. 107.

⁵⁵ *Henderson v. Banks*, 70 Tex. 398, 7 S. W. Rep. 815.

⁵⁶ *Hood v. Bank*, 9 Ala. 385.

⁵⁷ *Whitaker v. Gee*, 63 Tex. 435; *Russell v. Erwin*, 41 Ala. 292. But it seems the court cannot allow the amendment

of a judgment confessed severally on a joint bond, by adding the name of the co-obligor. *Brown v. Smyth*, 4 Harringt. 204. And see *Sprague v. Jones*, 9 Paige, 395.

⁵⁸ *Carskadden v. McGhee*, 7 Watts & S. 140.

⁵⁹ *Boland v. Benson*, 54 Wis. 387, 11 N. W. Rep. 911.

take, a judgment had been entered up in favor of a former administratrix, whose letters had abated by marriage, it was considered proper for the court to amend the judgment so as to make it read in favor of the administrator *de bonis non*, if he had been duly made a party and was the real plaintiff when the judgment to be corrected was entered.⁵⁰

§ 161. What Courts have Power of Amendment.

All courts, from the highest to the lowest, whose proceedings are preserved in any species of record or memorial, have the power and authority to make such corrections therein as truth and justice require and the rules of law permit. And this power, being inherent, belongs to a court merely as such, and does not depend upon a statutory grant of jurisdiction. An appellate court may modify and change its orders and decrees before they become final, and may, even at a subsequent term, amend its records in respect of clerical errors and mistakes.⁵¹ And its power extends even further than this. For if, on an appeal, the only error assigned is a clerical misprision in regard to the amount of the judgment, such mistake, being amendable on motion in the court below, will be amended by the appellate court at the cost of the appellant, and the amended judgment affirmed.⁵² A court of probate jurisdiction may amend its proceedings in a proper case; *e. g.*, after a sale by an administrator under its order, by adding to the administrator's account exhibited his affidavit that the same was just and true, formerly taken in court but not filed.⁵³ So also a justice of the peace may correct a judgment rendered by his predecessor in office, by a *nunc pro tunc* order, to make it conform to the truth.⁵⁴ And an arbitrator, it is held, after the delivery of his award, may correct a mere clerical error not affecting the merits.⁵⁵ The clerk of the court, however, has no *ex officio* right, without an express order of the court to that effect, to complete, alter,

⁵⁰ Gay v. Cheney, 58 Ga. 304.

⁵¹ Hill v. Hoover, 5 Wis. 386, 68 Am. Dec. 70; McCoy v. Porter, 17 Serg. & R. 59; Hopkins v. Flynn, 7 Cow. 526.

⁵² Smith v. Kennedy, 63 Ala. 334.

⁵³ Kennedy v. Wachsmuth, 12 Serg. & R. 171, 14 Am. Dec. 676.

⁵⁴ Gates v. Bennett, 33 Ark. 475.

⁵⁵ Goodell v. Raymond, 1 Williams (Vt.), 241.

or amend the record kept by a predecessor in that office whose term has expired.⁶⁶

§ 162. Time of making Application.

An application for the amendment of a judgment should be made, by the party in whose interest the correction is required, within a reasonable time after he has discovered the error. If he suffers an undue period to elapse, the court may refuse, on account of his laches, to accord the relief asked, and especially if rights have become vested under the judgment which would be disturbed by its alteration.⁶⁷ The amendment is generally discretionary with the court, but the circumstances are sometimes such that justice and right rather demand the refusal of the correction than its allowance. Thus, after money has been paid under an erroneous decree, it cannot be so altered or amended as to make a party to it liable to pay the money a second time;⁶⁸ although if, in satisfying the face of the judgment, he has paid only a part of that which was really awarded against him, the judgment may afterwards be amended so as to make him liable for the true balance.⁶⁹ So long as the record remains with the court which rendered the judgment, it is of course under its control for proper purposes and in proper cases. But it may be otherwise when the record has been removed to an appellate court. "Although there is some conflict of opinion as to whether an inferior court can amend the record whilst a case is pending upon writ of error in a higher court, we are inclined to think that the weight of authority is in favor of the proposition that the pending of such writ does not prove an impediment to the action of the court below."⁷⁰ And in California it is held that the amendment may be made even after the judgment has been affirmed on appeal.⁷¹ But in Alabama, on the other hand, it

⁶⁶Rockland Water Co. v. Pillsbury, 60 Me. 425.

⁶⁷Rogers v. Rogers, 1 Paige, 188.

⁶⁸Hassler's Appeal, 5 Watts, 176.

⁶⁹Mechanics' Bank v. Minthorne, 19 Johns. 244.

⁷⁰Sparrow v. Strong, 2 Nevad. 362; Richardson v. Mellish, 3 Bing. 346;

Freel v. State, 21 Ark. 226; Exchange Bank v. Allen, 68 Mo. 474; Dow v. Whitman, 36 Ala. 604. But compare Haydel v. Roussel, 1 La. Ann. 85.

⁷¹Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. Rep. 732; Roussett v. Boyle, 45 Cal. 64.

is considered that when a judgment or decree is affirmed on appeal, the decree or judgment of the court below is merged in the judgment of affirmance, and that court cannot afterwards make any order modifying or altering it.⁷¹ And this seems the more reasonable view, unless in cases where the error was not discovered until after the appellate proceedings were had.

§ 163. Method of applying for Amendment.

A judgment once entered must be corrected, if irregular or erroneous, by some proper proceeding for that purpose; it cannot be merely disregarded and the proper judgment entered anew.⁷² During the term at which the judgment was rendered, the correction may be made by an order of the court upon a mere suggestion of the error.⁷³ But after the term is ended, according to the practice in many of the states, the amendment can only be made upon the presentation of a formal petition and motion, setting forth the mistake and the alteration prayed for, and after proper notice to the adverse party to appear and show reasons why the correction should not be made.⁷⁴ In Indiana, an application to correct a mistake in a judgment should be made by motion, and though made in the form of a complaint it will be treated as a mere motion and not demurrable.⁷⁵ It is also to be observed that a motion to amend a judgment cannot be allowed in an action of *scire facias* upon the judgment, but must be made in the original cause.⁷⁶ If a judgment is other than that resulting from the conclusions of law arrived at by the court, it cannot be corrected by an appeal from an order granting or denying a new trial, but must be reached by an appeal from the judgment.⁷⁷

⁷¹ Werborn v. Pinney, 76 Ala. 291.

⁷² Nuckolls v. Irwin, 2 Nebr. 60.

⁷³ Weed v. Weed, 25 Conn. 337.

⁷⁴ *In re* Limerick Petitioners, 18 Me. 183; Rugg v. Parker, 7 Gray, 172; Weed v. Weed, 25 Conn. 337; State v. King, 5 Ired. 203; Forquer v. Forquer, 19 Ill.

68; Stockdale v. Johnson, 14 Iowa, 173; Arrington v. Conrey, 17 Ark. 100.

⁷⁵ Latta v. Griffith, 57 Ind. 329; Goodwine v. Hedrick, 29 Ind. 833.

⁷⁶ Clark v. Digges, 5 Gill, 109.

⁷⁷ Martin v. Matfield, 49 Cal. 43.

§ 164. Notice of Application.

The general rule is well established that a judgment cannot be amended, after the term at which it was rendered, upon an *ex parte* application. Due and proper notice must be given to the opposite party of the application and the relief asked, that he may have an opportunity to appear and show cause against the proposed correction.⁷⁸ Nevertheless if the amendment is to be based upon matter of record only, the necessity of giving notice to the adverse party is not so evident. In that case, any evidence against the amendment which he might produce, if drawn from extraneous sources, would be inadmissible and unavailing. And it is not at once apparent how his rights could be prejudiced by his ignorance of the proceedings. It seems that the same rule should here obtain as in the case of *nunc pro tunc* entries,—that notice is requisite only when evidence *dehors* the record will be consulted.⁷⁹ And indeed it has been held that if the amendment relates only to a matter of form, the notice may be dispensed with.⁸⁰ And the court in Michigan considered the omission of notice as immaterial, in a case where the amendment was not calculated to change the effect of the judgment, but merely to bring its terms into more perfect expression of the meaning which would have been ascribed to it by a proper construction of its language before the amendment.⁸¹ For, as the court observed, any person who was interested in the judgment, or acted on the faith of it, was chargeable with knowledge of all that a proper construction of

⁷⁸ *Wallis v. Thomas*, 7 Ves. 292; *Rockland Water Co. v. Pillsbury*, 66 Me. 427; *Weed v. Weed*, 25 Conn. 387; *Wooster v. Glover*, 37 Conn. 315; *Poole v. McLeod*, 1 Sm. & Mar. 391; *McNairy v. Castleberry*, 6 Tex. 286; *Wheeler v. Goffe*, 24 Tex. 660; *Martin v. Bank*, 20 Ark. 636; *Alexander v. Stewart*, 23 Ark. 18; *Cook v. Wood*, 24 Ill. 295; *Means v. Means*, 43 Ill. 50; *Berthold v. Fox*, 21 Minn. 51; *Hill v. Hoover*, 5 Wis. 386. Where a final decree dismissing a bill in equity was at a subsequent term amended so

as to purport to be a dismissal without prejudice, but the amendment was made upon a verbal notice to the solicitor of one defendant only and a notice posted upon the court-house door, *held*, that as there was no sufficient notice, the amendment was absolutely void for want of jurisdiction, and could be assailed in a collateral proceeding. *Swift v. Allen*, 55 Ill. 303.

⁷⁹ *Supra*, § 184.

⁸⁰ *Balch v. Shaw*, 7 Cush. 282.

⁸¹ *Emery v. Whitwell*, 6 Mich. 491.

it would have taught him, and the amendment did not change its meaning.

§ 165. Evidence.

In the matter of amending records, the rule of English practice forbids the correction of any judgment or decree unless there is sufficient record evidence, or evidence *quasi* of record, to amend by, and strictly excludes all parol testimony offered for that purpose. And this rule has been adopted, either expressly or tacitly, in many of the United States, and has become too firmly settled in their jurisprudence to admit of contradiction.⁵³ It has been concisely stated in the following language: "We think that no judgment can be amended, or one rendered *nunc pro tunc*, unless such amendment or rendition of judgment be authorized by matter of record, or by some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at the least by some book belonging to the office of the court and required to be there kept by law."⁵⁴ Where this rule obtains it is held that a judgment cannot be amended by the notes or minutes of the judge made upon the docket; they are not considered a part of the record nor evidence for any purpose.⁵⁵ Nor can the amendment be made from the judge's memory or knowledge of the fact omitted.⁵⁶ Nor by his affidavit in regard to the error to be corrected.⁵⁷ And certainly amendments cannot be

⁵³ Pitman v. Lowe, 24 Ga. 429; Gay v. Cheney, 58 Ga. 804; Armstrong v. Robertson, 2 Ala. 164; Brown v. Bartlett, 2 Ala. 29; Rains v. Ware, 10 Ala. 628; Metcalf v. Metcalf, 19 Ala. 819, 54 Am. Dec. 190; Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200; West v. Galloway, 33 Ala. 306; Harris v. Martin, 39 Ala. 556; Summersett v. Summersett, 40 Ala. 596, 91 Am. Dec. 494; Pettus v. McClannahan, 52 Ala. 55; Lilly v. Larkin, 66 Ala. 122; Guise v. Middleton, 1 Sm. & Mar. Ch. 89; Moody v. Grant, 41 Miss. 565; Russell v. McDougall, 3 Sm. & Mar. 284; Shackelford v. Levy, 63 Miss. 125; Hendrix v. Clay, 2 A. K. Marsh. 462; Norton v. Sanders, 7 J. J.

Marsh. 12; Stephens v. Wilson, 14 B. Mon. 88; Finnell v. Jones, 7 Bush. 359; Makepeace v. Lukens, 27 Ind. 435, 92 Am. Dec. 263; Hansen v. Schlesinger (Ill.), 17 N. E. Rep. 718; State v. Clark, 18 Mo. 482; Saxton v. Smith, 50 Mo. 490; DeCastro v. Richardson, 25 Cal. 49; Morrison v. Dapman, 8 Cal. 255; Swain v. Naglee, 19 Cal. 127; Solomon v. Fuller, 14 Nevad. 63.

⁵⁴ Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200.

⁵⁵ Dickson v. Hoff, 8 How. (Miss.) 165; Boon v. Boon, 8 Sm. & Mar. 318; Shackelford v. Levy, 63 Miss. 125.

⁵⁶ State v. Smith, 1 Nott & M. 16.

⁵⁷ Smith v. Brannon, 18 Cal. 107.

made from the recollections of witnesses testifying *ex parte*.⁸⁷ It is also the rule, in the states mentioned, that a decree in chancery, equally as a judgment at law, cannot be amended at a subsequent term upon parol testimony, but only upon evidence which is matter of record or *quasi* record.⁸⁸ Further, it is held that where the judgment is sought to be amended, after the term, for clerical errors or formal defects, it is necessary that the error or defect should be apparent on the record; it cannot be pointed out by affidavit.⁸⁹

On the other hand, in contravention of the rule that a judgment can only be amended by matter of record, in several of the states it is decisively held that it may be amended on *any* evidence, properly admissible, and satisfactory in its weight and character, showing it to differ from the judgment really rendered by the court.⁹⁰ In the language of the supreme court of New Hampshire: "We think it clear upon the authorities that the court may make such amendments upon any competent legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or the actual proceeding before it, what was the proper entry to be made on the docket, and how the record should be extended. . . . Where there is nothing more to rely on than mere memory, the court will act, if at all, with great caution."⁹¹ In a recent Indiana decision it was held that parol evidence was sufficient as a foundation for the correction of a clerical error in the amount of a judgment, the court observing that this was a different matter from making a *nunc pro tunc* entry of something that had been entirely omitted, in which case it might well be that parol evidence would not be admissible, but only the record

⁸⁷ Coughran v. Gutcheus, 18 Ill. 390.

⁸⁸ Kemp v. Lyon, 76 Ala. 212.

⁸⁹ Bramblett v. Pickett, 2 A. K. Marsh. 10, 12 Am. Dec. 350; Solomon v. Fuller, 14 Nevad. 63; State v. Primm, 61 Mo. 166; Portis v. Talbot, 33 Ark. 218.

⁹⁰ Matheson's Admr. v. Grant's Admr., 3 How. 263; Frink v. Frink, 43 N. H. 506, 80 Am. Dec. 189; Clark v. Lamb, 8 Pick. 415, 19 Am. Dec. 332; Rugg v. Parker, 7 Gray, 172; Weed v. Weed, 25

Conn. 337; Arrington v. Conrey, 17 Ark. 100; Hollister v. Judges, 8 Ohio St. 201, 70 Am. Dec. 100; Forquer v. Forquer, 19 Ill. 68; Stockdale v. Johnson, 14 Iowa, 178; Doane v. Glenn, 1 Colo. 454. See also the recent case of *In re Wight*, 184 U. S. 133, 10 Sup. Ct. Rep. 487.

⁹¹ Frink v. Frink, 43 N. H. 506, 80 Am. Dec. 189.

itself.⁸² The distinction, however, does not appear to rest upon any plausible basis. And the decision cited is a departure from the earlier rulings in the same state.⁸³ If parol evidence is to be admitted, the notes and minutes made by the judge upon the trial docket will of course be proper sources from which to obtain information as to the action really taken by the court.⁸⁴ And indeed they will naturally be consulted in the first instance. But since such memoranda are not a part of the record, and therefore not of controlling authority, it will be possible that they may be overborne by other evidence; and the court cannot be compelled to correct its journal from such minutes.⁸⁵

The rule that "a record can only be amended by matter of record" seems to rest, in the last analysis, upon the rule that "a record imports absolute verity." Without losing sight of the extreme importance of securing stability and authority to the solemn memorials of the courts, we may still conceive that this rule, if applied with full rigor and severity, might in many cases produce the greatest hardship and injustice. But it is evident to a student of American case-law, that we are gradually working away from the old standards in this respect. The courts are more and more disposed to a liberal practice and to look to the full and perfect administration of justice, rather than to buttress up the sanctity of records by forbidding inquiry into their truth. Hence it is not improbable that the policy of permitting judgments to be amended upon cause shown by any proper and satisfactory evidence, will ultimately prevail. Certainly it is a policy that is commended by reason and justice, and still more by the loose way in which the records of our courts are but too frequently made up. To shut out any light which could help to make the records accurate, complete, and right in themselves, appears to show a too superstitious reverence for the *littera scripta*.

⁸² Mitchell v. Lincoln, 78 Ind. 531.

⁸³ Gillett v. Booth, 95 Ill. 183.

⁸⁴ See Makepeace v. Lukens, 27 Ind. 485, 92 Am. Dec. 268; Boyd v. Blaisdell, 15 Ind. 73.

⁸⁵ Sullivan's Sav. Inst. v. Clark, 12 Nebr. 578, 12 N. W. Rep. 108.

§ 166. Method of making Corrections.

"An amendment should not be made by simply noting the order to amend, but it should be actually made by turning back to the minutes of the former term, and making the proper correction and entry there, so that the entry will stand and be read as if no amendment or correction had ever been necessary."⁸⁶ If the correction consists merely in adding a word or phrase, or adding or substituting a name or date, or altering an amount, or the like, it may be well enough to simply make the change upon the face of the original entry. But in general, interlineations are to be avoided; and the more regular mode of making amendments, after the term, is by an order of court reversing the defective entry, followed by a new order *nunc pro tunc*.⁸⁷ Where a decree already made in a cause is tacitly revoked, during the same term, and a second decree is made on the same subject-matter, it would be more orderly and convenient, in making the second decree, to refer to the first one, and state in what particulars the latter is intended to modify, supplement, or supersede the former; but this is not essential if a comparison of the two decrees discloses the changes or modifications made. On the contrary, it is to be presumed that a second decree made within the term is intended to modify a former one just so far as it differs from it, either in length or breadth.⁸⁸

§ 167. Allowance of Amendment is discretionary.

An application to amend a judgment or decree is addressed to the discretion of the court, and its denial is not the subject of exception or review.⁸⁹ Hence an appellate court will not issue its writ of *man-*

⁸⁶ *McDowell v. McDowell*, 92 N. Car. 227, 229. The court has power at any time to amend its records *nunc pro tunc*, and the clerk is bound not only to record the amendment, but also actually to alter the original record. *Jones v. Lewis*, 8 Ired. 70, 47 Am. Dec. 338.

⁸⁷ *King v. State Bank*, 9 Ark. 185, 47

Am. Dec. 739. Interlineal corrections of clerical omissions in a record, although irregular and reprehensible, do not necessarily invalidate the judgment. *Allen v. Sales*, 56 Mo. 28.

⁸⁸ *Barrell v. Tilton*, 119 U. S. 687, 7 Sup. Ct. Rep. 382.

⁸⁹ *Brown v. McCune*, 5 Sandf. 224; *Austin v. Jordan*, 5 Tex. 180.

damus to compel an amendment of the record of an inferior court. The question of amending is wholly a matter for the judicial discretion of the court having the custody of the record. And while *mandamus* is a proper means of compelling a judge to proceed to his duty, yet it cannot be used as a means of deciding for him what that duty is.¹⁰⁰ It is also true that the regularity of an amendment made by a court of competent jurisdiction cannot be inquired into collaterally.¹⁰¹

§ 168. Jurisdiction of Equity.

It is held in some of the states that the judgments of courts of record are of such high verity that their existence cannot be impeached, nor their contents contradicted, falsified, or corrected by parol proof, and consequently that a bill will not lie in equity to correct a judgment, purporting to be rendered upon the verdict of a jury, by showing by parol that the judgment was in reality by *nil dicit* without a jury, and should have been rendered for a larger sum than that specified on its face.¹⁰² On the other hand, in Iowa¹⁰³ and Missouri,¹⁰⁴ it is held that if judgment is by mistake entered for a sum less than the amount actually recovered, so that the creditor, without fault, loses a part of his judgment, equity will assist him, if he cannot obtain relief otherwise. But since the cases must be of very infrequent occurrence in which the law court could not correct a mistake of this kind on motion, there will seldom be an opportunity for chancery to exercise this power. Besides, its well known reluctance to interfere with the records of other courts will preclude action of this kind, unless in a case of very palpable hardship and entire inadequacy of any remedy at law.

§ 169. Effect of Amendments on Third Persons.

An amendment of a judgment or decree will never be allowed to prejudice the rights of third persons—such as subsequent judgment-

¹⁰⁰ *Commonwealth v. Hultz*, 6 Pa. St. 469; *Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. Rep. 825.

¹⁰¹ *Hamilton v. Seitz*, 25 Pa. St. 226, 64 Am. Dec. 694.

¹⁰² *Bank of Tennessee v. Patterson*, 8

Humph. 363, 47 Am. Dec. 618; *Smith v. Bowes*, 38 Md. 463.

¹⁰³ *Partridge v. Harrow*, 27 Iowa, 96, 99 Am. Dec. 643.

¹⁰⁴ *Wilson v. Boughton*, 50 Mo. 17.

creditors, purchasers, or mortgagees—who have acquired interests for value and without notice.¹⁰⁶ And in the order allowing an amendment it is proper to insert a saving of the intervening rights of third persons, but the law will make the reservation whether it is expressed or not.¹⁰⁶ “Assuming the general power of the courts, upon a proper application and due proof, to correct their records, the question arises, who are bound by such amendments? Ordinarily they affect the parties only to the proceedings; but in some cases, in the first instance, and in others subsequently, such amendments affect the rights and interests of many third persons. Are such persons bound by amendments of which they have no notice? We are of opinion that they are not bound, nor in any wise affected, by amendments made behind their backs, but as to them the records are to be regarded as remaining in their original state. In the case of judgments rendered by courts in cases where they have jurisdiction, the judgment is conclusive only against the parties to the proceeding and those who are deemed in law their privies, and with few exceptions they are not conclusive nor binding upon strangers. And it does not seem to us consistent with sound principles to give to the discretionary orders of the courts any more extensive effect than the law gives to their judgments. As a general rule, we think that every application for an amendment should show who are the parties having rights which may be affected by it, and due notice of the proceedings should be given them. Probably such notice as is required by law in the settlement of estates in the probate court would be sufficient, the proceedings being, like them, in the nature of proceedings *in rem*. But if notice is entirely omitted, or is given to a part only of those whose rights may be affected, the amendment will be made at the risk of being held ineffectual, and as if not made, as to those interested who had no notice.”¹⁰⁷

¹⁰⁶ *Crutcher v. Commonwealth*, 6 Whart. 340; *Colman v. Watson*, 54 Ind. 66; *Ligon's Admr. v. Rogers*, 12 Ga. 281; *Perdue v. Bradshaw*, 18 Ga. 287.

¹⁰⁶ *McCormick v. Wheeler*, 86 Ill. 114, 85 Am. Dec. 888.

¹⁰⁷ *Remick v. Butterfield*, 81 N. H. 70, 85, S. C. 64 Am. Dec. 316.

CHAPTER X.

THE VALIDITY OF JUDGMENTS.

- § 170. Voidable and Void Judgments.
- 171. Jurisdiction.
- 172. Character and Status of Parties.
- 173. Constitution of the Court.
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- 175. Acts of Judge de Facto.
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- 183. Judgment must be supported by the Pleadings.
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- 185. Findings necessary to support the Judgment.
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§ 170. Voidable and Void Judgments.

Before proceeding to a detailed examination of the questions which may affect the validity of judgments, it is necessary to point out the important distinction between judgments which are void and such as are merely voidable. The differences, though real and fundamental, are not always marked with sufficient sharpness in juristic writing, and courts have been known to speak of a judgment as "void" when they meant no more than that it was liable to be overturned if properly attacked. Now a *void* judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied

before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral. On the other hand, a *voidable* judgment is one which, though not a mere nullity, is liable to be *made* void when a person who has a right to proceed in the matter takes the proper steps to have its invalidity declared. It always contains some defect which may become fatal. It carries within it the means of its own overthrow. But unless and until it is duly annulled, it is attended with all the ordinary consequences of a legal judgment. The party against whom it is given may escape its effect as a bar or an obligation, but only by a proper application to have it vacated or reversed. Until that is done, it will be efficacious as a claim, an estoppel, or a source of title. If no proceedings are ever taken against it, it will continue throughout its life to all intents a valid sentence. If emanating from a court of general jurisdiction, it will be sustained by the ordinary presumptions of regularity, and it is not open to impeachment in any collateral action. When is a judgment void and when merely voidable? The answer to this question will form the subject of this and the two following chapters. It may be here stated, however, that it is very doubtful whether a judgment can ever be considered entirely void except in the single case where there was a total want of jurisdiction to render it. And even then, in the case of a domestic judgment, it is a serious question whether the lack of jurisdiction must not appear on the face of the record in order to entitle the courts to treat it as a nullity.¹ But there are many possible defects and irregularities which will render a judgment voidable.

Before leaving the subject it is necessary to advert to two words, often used in this connection, and which must be distinguished from those already explained. These are "irregular" and "erroneous."

¹See *infra*, § 218.

An irregular judgment is one which is rendered contrary to the course of law and the practice of the courts. The meaning of the term is therefore not exactly coextensive with that of "voidable," although the two are often used interchangeably. For while every irregular judgment is also, and for that reason, voidable, there may be other causes besides irregularity sufficient to avoid it. An erroneous judgment is one which, though regularly rendered, is contrary to law, and therefore liable to be reversed by an appellate tribunal. Irregular and erroneous judgments cannot be attacked collaterally. But the former can be vacated by the court which rendered them or by a court of review, according to the nature of the irregularity; the latter only by an appellate court. These distinctions are noted in an opinion of the supreme court of New York, from which we quote as follows: "Although a void judgment, or one that is voidable for irregularity, will not, after being set aside, justify the acts of the party done under it before it was set aside, this principle, I apprehend, has never been applied to a judgment merely erroneous and reversed for error by a court of review. An irregular judgment is called voidable, and when set aside is treated as though void from the beginning, for the party himself is held chargeable with the irregularity; while a judgment pronounced by the court, although upon an erroneous view of the law, and subject therefore to be reversed by an appellate tribunal, is never treated as void, but valid for all purposes of protection to the party acting under it before reversal. The fact that in the one case the party is responsible for the irregularity, and in the other whatever of error there is in the judgment is the error of the court, seems to be the ground of the distinction between the two, and it is manifestly a just and proper distinction. While it may well be held that a party is not justified by a judgment which is subsequently set aside for an irregularity in entering it up, which is his own act, it would seem unjust to hold that a judgment duly rendered by the court shall fail to protect a party acting under it before reversal, because reversed for error committed by the court."²

²Simpson v. Hornbeck, 8 Lans. 53. *parte* Lange, 18 Wall. 175; Wolfe v. See also Gray v. Stuart, 33 Gratt. 358; Davis, 74 N. Car. 599. Boggess v. Howard, 40 Tex. 153; *Ex*

§ 171. Jurisdiction.

The first and fundamental requisite to the validity of a judgment is that it should have been rendered by a court having jurisdiction. Without jurisdiction the courts can do nothing, and a judgment given forth without jurisdiction is a mere nullity. The jurisdiction required is of three sorts: (1) jurisdiction of the parties; (2) jurisdiction of the general subject-matter; (3) jurisdiction of the particular matter which the judgment professes to decide. But the subject of jurisdiction is of such importance and intricacy as to require treatment in a separate chapter, and is mentioned here only for the sake of logical completeness.

§ 172. Character and Status of Parties.

The validity of a judgment may also depend in many instances on the character or status of the party against whom it is rendered. And in the case of persons who are under legal disabilities, judgments may be irregular and voidable for the failure to comply with statutory formalities, or to protect the defendants in the ways prescribed by law, or may even be considered void for the want of power of the courts over them. This subject will be examined in detail in the next chapter.

§ 173. Constitution of the Court.

In order that a judgment should be recognized as valid, it is of course necessary that it should have been rendered by a lawful and duly constituted court; otherwise it is not "the sentence of the law" and is not entitled to carry its sanction.³ But on principles of public policy and for the security of rights, it is held that the regular judgments of a *de facto* court, whose existence has afterwards been pronounced unconstitutional and void, are nevertheless valid and conclusive.⁴ Thus, in a case before the supreme federal tribunal, it was

³Rogers v. Wood, 2 B. & Ad. 245.

Rep. 409; State v. Anone, 2 Nott & M.

⁴State v. Carroll, 38 Conn. 449, 9 Am.

27; Den dem. Gilliam v. Reddick, 4

held that an adjudication made by a Spanish court in Louisiana was not void because made after the cession of that territory to the United States. "For we know historically," said Thompson, J., "that the actual possession of the territory was not surrendered until some time after these proceedings took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, although ceded, was *de facto* in the possession of Spain and subject to Spanish laws. Such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid."⁶

In regard to the validity of judgments rendered by the courts of the states which attempted to secede from the Union in 1861, there has been a great fluctuation of opinion, and it is only of late that the authorities have come to a substantial agreement. At first, and particularly in some of the reconstructed states, there was a strong disposition to treat all such judgments as mere nullities. This view was based on the theory that, the government of a state organized under the Confederacy being an usurpation and being erected in hostility to the lawful government of the country, all its acts were void; and the same objections which might be urged against its laws would be sufficient to overturn its judgments, both being parts of one whole.⁶ But after a time, impressed with the idea that some sort of government existed in those states during the war, and that the courts created or recognized by it were at least considered lawful tribunals by that government, real or pretended, and that respect was paid to their adjudications by the persons who acknowledged that government as rightful, the authorities were inclined to put such judgments upon the footing of *quasi* foreign judgments. That is, they were not to receive the full faith and credit due to a domestic judgment, but neither were they to be treated as entirely void. They were considered as *prima facie* evidence, but cause might be shown against their being carried into effect.⁷ The position was anomalous in the

Ired. 368; State v. Porter, 1 Ala. 688; Mayo v. Stoneum, 2 Ala. 390; Masterson v. Matthews, 60 Ala. 260; State v. Alling, 12 Ohio, 16.

⁶ Keene v. McDonough, 8 Pet. 308.

⁶ Penn v. Tollison, 26 Ark. 545; Thompson v. Mankin, Id. 586; Ray v. Thompson, 48 Ala. 454.

⁷ Pepin v. Lachenmeyer, 45 N. Y. 27; Martin v. Hewitt, 44 Ala. 418; Mosely

extreme, and the theory itself quite untenable. For, as pointed out by Dr. Wharton,⁹ in suing upon such a judgment it would be necessary to declare as upon a judgment in a state not belonging to the United States, and therefore virtually foreign. But a foreign judgment, rendered in the courts of a state whose independence our own government has never acknowledged, cannot be recognized as a judgment on which suit can be brought. At a still later period, a view came to be recognized which was the exact opposite of that first adopted, viz., that the judgments rendered by the Confederate courts during the war were in all respects legal and conclusive. It was held that the state government, as organized and existing in all its departments in one of those states during the continuance of hostilities, was its rightful *de jure* government; and accordingly that judgments and proceedings of its courts, which during that time formed a portion of that government, not violative of the constitution and laws of the United States, nor infringing upon the state constitution, were valid and binding.¹⁰ In the mean time the supreme court of the United States had been called upon to consider these questions, and had ruled that an act of the "Confederate Congress" creating a court was void, and that the court itself was a mere nullity and could exercise no rightful jurisdiction.¹⁰ There is no difficulty in accepting this position if we deny to that body the rights and powers of a government. For of course a mere assemblage of private persons, acting in rebellion against the law of the land, cannot create a court of law, and the acts of such pretended court would be destitute of any authority. But on the other hand, if the insurrectionary authorities had no power to create, they had no power to destroy. By no act or proceeding could they strip a lawful pre-existing tribunal of its power and jurisdiction or terminate its existence. Their laws, being altogether void, had no effect whatever upon the courts which had been duly organized before the rebellion began. And still less could any

v. Tuthill, 45 Ala. 631, 6 Am. Rep. 710
Shaw v. Lindsay, 46 Ala. 290; Bush v.
Glover, 47 Ala. 167; Barclay v. Plant,
50 Ala. 509; Bibb v. Avery, 45 Ala. 691.

⁹ 1 Whart. on Ev. § 807.

¹⁰ Parks v. Coffey, 52 Ala. 32; Hill v.

Huckabee, 52 Ala. 155; McQueen v. McQueen, 55 Ala. 433; Steere v. Tenney, 50 N. H. 461; Hill v. Armistead, 56 Ala. 118; Hendry v. Cline, 29 Ark. 414. See Blackwell v. Willard, 65 N. Car. 555.

¹⁰ Hickman v. Jones, 9 Wall. 197.

change in the judicial system be effected by the mere declaration of secession. "The objection that the judgment of the supreme court of Louisiana is to be treated as void because rendered some days after the passage of the Ordinance of Secession of that state, is not tenable. That Ordinance was an absolute nullity, and of itself alone neither affected the jurisdiction of that court or its relation to the appellate power of this court."¹¹ These two decisions outline the view which has prevailed in the supreme federal court and which must now be regarded as the accepted doctrine. Courts organized by the Confederate authorities for distinctively national purposes, and as a part of what was intended to be a national judicial system, had no legal existence, and all their acts were mere nullities. But the courts of the several states, in their individual capacities, had a lawful existence, notwithstanding the usurpation of the state governments by the insurrectionary authorities, and even though they professed to derive their powers from those who, *de facto*, had possession of the state government. Accordingly, their judgments, so far as they did not tend to impair the supremacy of the federal authority or the just rights of citizens under the constitution, are to be treated as valid and binding.¹² But this is subject to an important qualification, *viz.*, that such judgments could have no effect as against defendants who were residents of other states not sharing in the rebellion. This exception is established by a noteworthy decision in Ohio, where it was held that as between parties residing in the state of Arkansas and within the rebel lines, and a citizen of Ohio, resident within the Union lines, between whom the war made intercourse impossible, there could be no jurisdiction in a Confederate court in Arkansas by which

¹¹ *White v. Cannon*, 6 Wall. 443.

¹² *Horn v. Lockhart*, 17 Wall. 570. In this case the court said: "The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crimes prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of proper-

ty regulated, precisely as in times of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile, in their purpose or mode of enforcement, to the authority of the national government, and did not impair the rights of citizens under the constitution."

the rights of non-residents could be injuriously affected. Neither could such jurisdiction be acquired by the consent or waiver of an attorney practicing in said court, who was employed and appeared for the non-resident defendants before the war commenced. His general authority as an attorney, before the war, though not revoked by the clients, did not authorize him to waive any of their rights, nor could such consent or waiver confer on the court jurisdiction over the case or over the defendants.¹³ Questions have arisen as to the validity of judgments rendered by a tribunal created by a military commander in a district of insurrectionary territory held by him in belligerent occupation. But as these questions chiefly relate to the effect of such judgments as *res judicata*, the consideration of them is postponed to another place.¹⁴

§ 174. Disqualified Judge.

The validity of a judgment may often depend upon considerations personal to the judge who rendered it. He may be disqualified from acting in the particular case by reason of his being concerned as a party, or otherwise interested in the event of the suit, or on account of his relationship or affinity to one of the litigants, or because he is not qualified for the office in accordance with the statutory requirements. And first, in regard to his *interest* in the suit; it is a maxim of the common law that *nemo potest esse judex in propria causa*.¹⁵ And indeed natural justice, as well as a regard for the integrity and impartiality of the judiciary, sanction the same rule. Accordingly it is held, under statutes forbidding a judge to act in a cause in which he is interested, that if he should assume to decide a case where his personal interest might come in conflict with his judicial indifference, the judgment so rendered would be entirely null and void.¹⁶ So a judgment pronounced by a judge who was disqualified

¹³ *Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 840. See also *Botts v. Crenshaw*, Chase's Dec. 227; *Livingston v. Jordan*, Id. 454; *Brooks v. Feler*, 35 Ind. 402; *French v. Tomlin*, 10 Am. L. Reg. 642.

¹⁴ See *infra*, vol. 2, § 525.

¹⁵ 12 Co. 113.

¹⁶ *In re Cottle*, 5 Pick. 488; *Coffin v. Cottle*, 9 Pick. 287; *Sigourney v. Sibley*, 21 Pick. 101; *Gay v. Minot*, 8 Cush. 352; *Washington Ins. Co. v. Price*, 1 Hopk. Ch. 1; *Place v. Manuf. Co.*, 28 Barb. 508; *State v. Castleberry*, 28 Ala. 85.

on account of his having been of counsel in the case, is void and not conclusive on the parties.¹⁷ It does not appear that this would have been so at common law, for the doctrine seems rather to have been that the acts of a disqualified judge were not merely nullities, but were liable to be avoided or reversed on a proper application, although the parties might admit their binding force by acquiescence.¹⁸ In the next place, the *relationship* of the judge to any of the parties in the cause is made a ground of his disqualification, by statute in many of the states. And there are cases holding that a judgment attempted to be rendered by one who was disqualified by reason of his consanguinity with a litigant, is utterly void and incapable of being made good by any waiver or consent.¹⁹ But the rule obtaining in a majority of the states is that such a judgment is voidable and liable to be set aside on proper proceedings for that purpose, but is not absolutely void; it is a sufficient protection to persons lawfully acting under it while it stands, and it cannot be attacked collaterally.²⁰ Some of these decisions were rendered under statutes providing that the parties interested might waive the disqualification by consenting to the action of the judge. And when this is the case, it is entirely reasonable to hold that, if no express objection appears, the judgment will be voidable at most, not void. "These disqualifications may be unknown, or so obscure as to require a judicial decision to determine their existence. It is a serious thing to annul the judgments of the courts, and it ought not to be done where the consent of the parties alone is requisite to their validity, and its entry on the record is the only admissible evidence that it was given."²¹ The

¹⁷ *Newcome v. Light*, 28 Tex. 141.

¹⁸ *Dimes v. Grand Junction Canal Co.*, 47 Jur. 78; *Gorrill v. Whittier*, 8 N. H. 268.

¹⁹ *Chambers v. Clearwater*, 1 Keyes, 810; *Oakley v. Aspinwall*, 8 N. Y. 547; *Hall v. Thayer*, 105 Mass. 219. See *Reams v. Kearns*, 5 Cold. 217; *Horton v. Howard* (Mich.), 44 N. W. Rep. 1112; *In re Depuy's Estate*, 9 N. Y. Supp. 131.

²⁰ *Fowler v. Brooks*, 64 N. H. 428, 13 Atl. Rep. 417 (citing *Phillips v. Eyre*, L. R. 6 Q. B. 1, 22); *Trawick v. Tra-*

wick, 67 Ala. 271 (citing *Hine v. Hussey*, 45 Ala. 496; *Hayes v. Collier*, 47 Ala. 726; *Plowman v. Henderson*, 59 Ala. 559; *Heydenfeldt v. Towns*, 27 Ala. 423); *Rogers v. Felker*, 77 Ga. 46.

²¹ *Hine v. Hussey*, 45 Ala. 496, 513. A judgment is not void because the judge rendering it is related in equal degree to both the parties litigant, especially when no objection was made at the hearing on this ground. *Beall v. Sinesfield*, 73 Ga. 48.

disqualification may also arise from omission of statutory requirements on the part of the person assuming to act as judge. Thus, a judgment rendered by an attorney orally appointed judge and acting by consent of parties, but without having taken the prescribed oath, is void for want of jurisdiction.²²

§ 175. Acts of Judge *de Facto*.

This brings us to the consideration of acts done by a judge *de facto*. A person may be entitled to this designation who, although he is not a true and rightful incumbent of the office, yet is no mere usurper, but holds it under color of lawful authority. And there can be no question that judgments rendered and other acts performed by such a person are valid and binding. If a contested election, for example, should result in the ouster of the person who, being entitled on the face of the returns, was commissioned and qualified as judge, this would not retrospectively invalidate the judgments he may have rendered while in actual possession of the office. So judges elected and duly qualified, and who exercise the functions of their office, are *de facto* officers, although the act under which they were elected was unconstitutional.²³ And a person who is ineligible to a judgeship, but who has nevertheless been duly appointed, and who exercises the powers and duties of the office, is a *de facto* judge, and his acts are valid until he is properly removed.²⁴ Again, one duly elected to a judgeship, and commissioned a judge by the governor, and discharging the functions of the office, is a judge *de facto*, although the supreme court afterwards decides that the term of his predecessor had not expired.²⁵ So also the acts of a *de facto* judge cannot be attacked collaterally, by showing that he has taken no oath of office, or that he has taken an oath to support a power in insurrectionary hostility to the federal government.²⁶ These rules are founded upon

²² *Herbster v. State*, 80 Ind. 484.

²³ *Campbell v. Commonwealth*, 96 Pa. St. 344; *Burt v. Winona & St. P. R. Co.*, 81 Minn. 472, 18 N. W. Rep. 285; *In re Ah Lee*, 6 Sawy. 410; *Carland v. Custer*, 5 Mont. 579, 6 Pac. Rep. 24; *Taylor v.*

Skrine, 8 Brev. 516; *Brown v. O'Connell*, 86 Conn. 432.

²⁴ *Ostrander v. People*, 29 Hun. 518; *Blackburn v. State*, 8 Head. 690; *Gregg v. Jamison*, 55 Pa. St. 468.

²⁵ *McCraw v. Williams*, 83 Gratt. 510.

²⁶ *Pepin v. Lachenmeyer*, 45 N. Y. 27.

sound principles of public policy and justice, and are generally wholesome in their practical operation.

§ 176. Judge out of Office.

It is generally held that a judgment or decree rendered, or order made, by a judge whose term of office has expired, but who continues in possession and exercise of the functions of the office, is valid and binding as the act of a *de facto* officer.²⁷ Thus, in a recent case, the action was tried on November 30th and a decree rendered December 6th, the term of court having begun on November 8th and continued till December 6th, on which day the decree was dated and filed. It transpired that the term of office of the judge who signed the decree expired on December 2d. But it was held that the judge was an officer *de facto* and his decree valid as a decree of the court.²⁸ So in another case, a judge whose office was vacated by his taking a seat in the legislature, but who continued to exercise the functions of a judge, was considered to be a *de facto* officer and his acts consequently valid.²⁹ If a judgment or decree was actually rendered before the judge's term expired, it is of course immaterial that it was not docketed or filed until afterwards. Thus, where a cause was submitted to a judge to be determined in vacation, and he made his decision and deposited it, with the papers, in the express office the day before his term of office expired, directed to the clerk of the proper county, it was held that the decision was then complete and it was not invalidated because it was not filed in the clerk's office before the expiration of the judge's term.³⁰

§ 177. Time and Place of holding Court.

It is held in several of the cases, that it is indispensable to the validity of a judgment that it be rendered at the time and

²⁷ Read v. Buffalo, 4 Abb. App. Dec. 22; Carli v. Rhener, 27 Minn. 292, 7 N. W. Rep. 139; State v. Williams, 5 Wis. 308, 68 Am. Dec. 65; Cary v. State, 76 Ala. 78; Threadgill v. Carolina &c. R. Co., 73 N. Car. 178; Woodside v. Wagg, 71 Me. 207.

²⁸ Cromer v. Bolnest, 27 S. Car. 426, 3 S. E. Rep. 849. But compare Mace v. O'Reilley, 70 Cal. 231, 11 Pac. Rep. 721.

²⁹ Woodside v. Wagg, 71 Me. 207.

³⁰ Babcock v. Wolf, 70 Iowa, 676, 23 N. W. Rep. 490; McDowell v. McDowell, 92 N. Car. 227.

place prescribed by law.²¹ And the holding of a court at a time or place other than that ordained or authorized by law, and all proceedings thereunder, are *coram non judice* and void.²² Perhaps the rule is too broadly stated in these decisions. But it may be admitted that the fact that a term of court was not held at the time prescribed by law will constitute a ground for the reversal of a judgment rendered in such term.²³ But if there was reasonable mistake in regard to the time fixed by law, and color of authority for the time actually selected, there is authority for the view that a judgment so rendered is perfectly valid. Thus, in a case in Tennessee, it appeared that an act of the legislature had changed the times for the sitting of the circuit court for a certain county. This change was not known to the officers of the court, the act having been passed but a short time before a term was to be held. The court was held by the presiding judge at the time before fixed by law, but at a different time from that required by the law then in force. A judgment was rendered by the court thus sitting, the justice of which was not controverted. And it was held that the judgment was valid; that the acts of a judge regularly in office are valid, if he hold his court under color of law, although the law may be repealed or invalid.²⁴ On similar principles, and by an even stronger reason, a judgment is valid when rendered at a term which was commenced at the day fixed by law, although, in the middle of the term and before the judgment, a new statute changes the time for holding the court, because the later act will not affect a term already lawfully commenced.²⁵ And where, in the absence of the judge, the sheriff adjourned the court without authority, the adjournment was held to be a nullity, and a judgment entered by the court two days afterwards was held valid.²⁶ In regard to the *place* of holding a court, compliance with the law is of course important, and perhaps essential to the perfect validity of the judgments rendered. But

²¹ State v. Roberts, 8 Nevad. 289; Dalton v. Libby, 9 Nevad. 192; Cooper v. American Central Ins. Co., 8 Colo. 818; Wicks v. Ludwig, 9 Cal. 178.

²² Grimmer v. Askew, 48 Ark. 151, 2 S. W. Rep. 707.

²³ Smithson v. Dillon, 16 Ind. 169. See Coffinberry v. Horrill, 5 Cal. 493; Bowden v. Hatcher (Ga.), 9 S. E. Rep. 724.

²⁴ Venable v. Curd, 2 Head, 582.

²⁵ Clare v. Clare, 4 Greene (Iowa), 411.

²⁶ Thomas v. Fogarty, 19 Cal. 644.

it does not appear, from the authorities, to be so indispensable that deviation from the law in this respect will of itself be sufficient to render such judgments absolutely void.²⁷ If it appears by the record of a judgment that the court which pronounced it had jurisdiction of the person of the defendant and of the subject-matter of the suit, such judgment will not, in a collateral proceeding, be held void upon proof being made that it was rendered at a place other than the established seat of justice of the county, when it is shown that all the houses at the latter place had, before the rendition of the judgment, been destroyed by fire, and that the county court had accepted, as a temporary seat of justice, the place at which the judgment was rendered.²⁸

§ 178. Place of Trial.

In California it is held that where a cause is transferred, because of the disqualification of the judge, to an adjoining judicial district, under authority of statute, the judgment therein is not void or subject to collateral attack because the county to which the cause was transferred was not the *nearest* one, as required by the statute. "We cannot see," said the court, "how it can be law that a judgment can be impeached collaterally and held void, because a judge has made an inconsiderable mistake in computing distances, or had selected a county-seat more readily accessible than the other in coming from L., and holding it to be really the nearer on that account. The judge had jurisdiction to make this order under the statute then in force. He must determine what is the nearest court in administering the law. This determination was undoubtedly within his power, and if he sent it to a county some distance further than another, by error of a miscalculation of distances, it would be nothing more than an error, and should not render the judgment void. Conceding that this judgment might have been reversed on appeal, still it would not be void on collateral attack."²⁹ This decision illustrates the difference between void judgments and such as are merely erroneous. In gen-

²⁷ *LeGrange v. Ward*, 11 Ohio, 257;
Smith v. State, 9 Humph. 10.

²⁸ *Herndon v. Hawkins*, 65 Mo. 265.

²⁹ *Gage v. Downey* (Cal.), 21 Pac. Rep. 527.

eral, as already stated, a judgment is not *void* except for a total failure of jurisdiction.

§ 179. Judgment rendered in Vacation.

When the law provides for the holding of regular terms of a court, it is only during term-time that the judges are invested with their full judicial character. Necessary rules and orders, ministerial acts, and some matters which go as of course, may fall within the powers of the court in vacation. But in general all judicial functions are suspended during that interval. Hence, unless under statutory authority, a judgment cannot be pronounced in vacation. The rendition of judgment, in a court of record, is essentially a judicial act, and if performed when the court is not in session, that is, out of term, it is open to a fatal jurisdictional objection; the judgment is absolutely void, creates or affects no rights, and will even be disregarded on appeal.⁴⁰ "The judge of the court below had no power to render any judgment or decree in vacation. The statute provides for regular terms of the court to be held for the trial of causes, and it does not provide for the rendering of judgments or decrees at any time except during the term."⁴¹ And again: "With a few exceptions, all matters of a judicial character must be heard and determined by the court at a term fixed by and held in accordance with law. The motion under consideration [to discharge a garnishee] does not constitute one of the exceptions."⁴² While this is the case, it is also held in several of the states that the parties may *consent* to the rendition of a judgment during the vacation of the court, which judgment is then to be entered as of the preceding term,⁴³ or the ensuing term,⁴⁴ and will be perfectly valid as between the parties,⁴⁵

⁴⁰ *Kimports v. Rawson*, 29 W. Va. 487, 2 S. E. Rep. 85; *Dixon v. Judge of District Court*, 26 La. Ann. 119; *Culver v. Leovy*, 21 La. Ann. 306; *Dodge v. Coffin*, 15 Kans. 277; *Bruce v. Doolittle*, 81 Ill. 103; *Shepperd v. Wilson*, 1 Morris (Iowa), 448; *Peabody v. Phelps*, 7 Cal. 53; *Filley v. Cody*, 4 Colo. 109; *Champion v. Sessions*, 1 Nevad. 478.

⁴¹ *Earls v. Earls*, 27 Kans. 538.

⁴² *Laughlin v. Peckham*, 66 Iowa, 121, 23 N. W. Rep. 294.

⁴³ *King v. Green*, 2 Stew. 133, 19 Am. Dec. 46.

⁴⁴ *Hervey v. Edmunds*, 68 N. Car. 243.

⁴⁵ *New Orleans v. Gauthreaux*, 33 La. Ann. 1126; *Green v. Reagan*, 32 La. Ann. 974; *Hervey v. Edmunds*, 68 N.

and even against third persons in the absence of fraud or collusion.⁴⁶ Nor is the main rule of quite universal application. In some states, either in accordance with the established practice of the courts,⁴⁷ or by express statutory authority,⁴⁸ the courts are empowered to make decrees or orders or render judgments in vacation. And when this power is given, it of course includes the jurisdiction necessary to make a decision in vacation upon a cause proved and submitted in term-time. In this connection we must notice a certain class of statutes authorizing cases to be "taken under advisement" by the court. In Mississippi it is considered that a statute of this character does not authorize the rendition of a judgment in vacation, but the judgment must be given by the court upon the delivery of the judge's opinion in writing at the next term after the submission of the case.⁴⁹ In Illinois, however, under a similar statute, it is held that a decree may be rendered in vacation, but that it will remain *in fieri* and subject to modification, and not become final, until after the expiration of the succeeding term, and then only as approved at that term.⁵⁰

The *rendition* of a judgment, it will be remembered, is an entirely distinct thing from the *entry* of it. The former is the act of the law through the mouth of the judge; the latter the act of the clerk. The former gives force and efficacy to the judgment; the latter preserves a memorial of it. The former is a judicial act; the latter a ministerial act. A judgment is none the less a sentence of the law because it is erroneously entered or not entered at all. Hence it follows that if a judgment is duly rendered during term-time, it is then complete, and its validity is in no wise affected by the fact that the clerk does not enter it until the vacation.⁵¹ It is also to be here noted that the meaning of the word "vacation," as used, for example, in a statute which authorizes the confession of judgments dur-

Car. 248; *King v. Green*, 2 Stew. 183, 19 Am. Dec. 46; *Hattenback v. Hoskins*, 12 Iowa, 109; *O'Hagen v. O'Hagen*, 14 Iowa, 264.

⁴⁶ *New Orleans v. Gauthreaux*, 82 La. Ann. 1126.

⁴⁷ *Beyerle v. Hain*, 61 Pa. St. 226.

⁴⁸ *Ex parte Bennett*, 44 Cal. 85.

⁴⁹ *Wilson v. Rodewald*, 61 Miss. 223.

⁵⁰ *Hook v. Richeson*, 115 Ill. 481, 5 N. E. Rep. 98.

⁵¹ *Sieber v. Frink*, 7 Colo. 148, 2 Pac. Rep. 901; *Earls v. Earls*, 27 Kana. 538. *Supervisors of Manitowoc Co. v. Sullivan*, 51 Wis. 115, 8 N. W. Rep. 12. But in Indiana it is held that a judgment duly pronounced in term, but entered in vacation, and the entry never seen

ing vacation, may not be the same as that known to the common law, viz., "all the time between the end of one term and the beginning of another,"⁵³ but it may cover a recess caused by the adjournment over of the court for a number of days.⁵⁴

§ 180. After Expiration of Term.

As a corollary of the rule stated in the preceding section, it is held that a judgment of a court holding regular terms, if rendered after the time fixed by law for its adjournment, is invalid and will be reversed on appeal.⁵⁵ But where the trial of a cause is commenced in a term with the *bona fide* expectation and belief that it will be concluded before the day shall arrive when the judge is directed, but not imperatively required, to hold court in another county, he may remain, conclude the trial of that case, receive the verdict, and pass judgment, even though this may happen to be done on a day, or at a time, when regularly he would be holding court in another county.⁵⁶ And if a judgment be ordered and its terms prescribed by the court during a term, it is a judgment rendered in term-time although the entry thereof be not in fact prepared and transcribed on the journal until after the close of the term.⁵⁷ On principles analogous to those obtaining in the case of courts of record, it is held that if a justice of the peace adjourns a cause without specifying the hour of the day or the place to which it is adjourned, he loses jurisdiction and his subsequent judgment is void.⁵⁸ But in several of the states it is held

by the judge nor signed by him, though his name was signed by an attorney, is invalid, and its execution will be enjoined. *Mitchell v. St. John*, 98 Ind. 598. And see also *First Nat. Bank of McGregor v. Hostetter*, 61 Iowa, 395, 18 N. W. Rep. 289.

⁵³ *Jacobs, Law Dict.; Bouvier, Law Dict.*

⁵⁴ *Conkling v. Ridgely*, 112 Ill. 86, 54 Am. Rep. 204, 1 N. E. Rep. 261.

⁵⁵ *Smith v. Chichester*, 1 Cal. 409; *Passwater v. Edwards*, 44 Ind. 342.

⁵⁶ *State v. Knight*, 19 Iowa, 94.

⁵⁷ *Iliff v. Arnott*, 81 Kana. 672, 8 Pac. Rep. 525.

⁵⁸ *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451. But in Nebraska, where a justice of the peace has jurisdiction of the subject-matter and of the parties, a judgment rendered by him after the expiration of the time fixed by statute must be corrected by a direct proceeding for that purpose, and will not be enjoined upon that ground alone. *Gould v. Loughran*, 19 Nebr. 392, 27 N. W. Rep. 897.

that while judgments should be signed and entered during the term, yet if the parties *consent* that the cause be taken under consideration by the judge, and a judgment rendered and signed after the term shall have expired, and entered as of the term, it will not be irregular.⁵⁵ And a party to the action who fails to interpose an objection to this procedure, at the proper time, waives his right, which amounts to an implied consent and concludes him.⁵⁶ The decision of a cause may be carried over the vacation by a proper entry; but if a judgment be continued by *curia advisari vult*, and be not given until the term succeeding that at which the verdict was rendered, the judgment must be entered and signed as of such succeeding term, not of the former term.⁵⁷

§ 181. Premature Entry of Judgment.

The rendition of judgment at a term before that fixed by statute is considered not as a mere formal defect which may be remedied by an amendment in the court below, but as a radical error.⁵⁸ Thus, the entry of final judgment at the same term with a default, when the statute provides that the former shall be entered at the next term after the default, is an irregularity, although, in this instance, it appears that the error may be corrected on motion at a subsequent term.⁵⁹ So also an order of court which bears date as of a day not yet arrived is absolutely without effect, at least until that day shall arrive.⁶⁰ In this connection also must be mentioned the rule that final judgment cannot properly be rendered in any case while there are issues of law or fact remaining undisposed of or undetermined.⁶¹

⁵⁵ Shackelford v. Miller, 91 N. Car. 181; Hardin v. Ray, 89 N. Car. 364; Morrison v. Citizens' Bank, 27 La. Ann. 401.

⁵⁶ Molyneux v. Huey, 81 N. Car. 106.
⁵⁷ Thorpe v. Corwin, 20 N. J. Law, 811.

⁵⁸ Teat v. Cocke, 42 Ala. 336.

⁵⁹ Nave v. Todd, 88 Mo. 601. A judgment rendered by a justice of the peace

before the return-day of the warrant, is not void but erroneous. Glover v. Holman, 8 Helsk. 519.

⁶⁰ Smith v. Coe, 7 Rob. (N. Y.) 477.

⁶¹ Bosman v. Akeley, 39 Mich. 710, 33 Am. Rep. 447; Aymar v. Chace, 13 Barb. 301; Barrett v. Thompson, 5 Ind. 457; Miller v. Hoc, 1 Fla. 189; Clark v. People, 15 Ill. 213; Hammond v. Freeman, 9 Ark. 62.

§ 182. Sundays and Holidays.

It is a maxim of the common law that *dies dominicus non est juridicus*.⁶⁵ Accordingly no valid judgment can be rendered upon Sunday. "That courts have no right to pronounce a judgment or do any other act strictly judicial on Sunday, unless expressly authorized by statute, seems to be too well settled to admit of a doubt by the decisions in England and in this country. The cases all show that a judgment entered of record on Sunday is not only erroneous, but is absolutely void."⁶⁶ In one state, however, a curious result has been attained by the concurrent operation of two statutes affecting this subject. One act provides that "no court can be opened, nor any judicial business transacted, on Sunday or any legal holiday, except (1) to give instructions to a jury then deliberating on its verdict, (2) to receive a verdict or discharge a jury, (3) to exercise the powers of a single magistrate in a criminal proceeding." The other enacts that "upon a verdict, the justice must immediately render judgment accordingly." Construing these two acts together, the courts have held that it is a justice's duty to render a judgment immediately upon a verdict returned upon Sunday, and he has no discretion in the matter.⁶⁷ Since the *entry* of a judgment, as distinguished from its rendition, is a merely ministerial act, there can be no doubt that it will not be invalidated by the fact that it was put upon the record or the docket by the clerk on a Sunday. But in that case it should not appear to have been *rendered* on Sunday. However, the court is not bound to accept as true a docket-entry that a judgment was rendered on that day when there is extraneous evidence that in fact it was not.⁶⁸

⁶⁵ Co. Lit. 135a; Broom's Maxims, 21.

⁶⁶ *Barter v. People*, 3 Gilm. 368, 384; *Mackalley's Case*, 5 Co. 66; *Swann v. Broome*, 3 Burr. 1595; *Pearce v. Atwood*, 13 Mass. 347; *Chapman v. State*, 5 Blackf. 111; *Nabors v. State*, 6 Ala. 200; *Frost v. Hull*, 4 N. H. 158; *Arthur v. Mosly*, 2 Bibb. 589; *Story v. Elliot*, 8 Cow. 27, 18 Am. Dec. 423; *Davis v. Fish*, 7 Greene (Iowa), 406, 48 Am. Dec. 387; *Blood v. Bates*, 31 Vt. 147; *City of Par-*

sons v. Lindsay (Kans.), 21 Pac. Rep. 227; *Allen v. Godfrey*, 44 N. Y. 433; *Coleman v. Henderson*, 6 Litt. 171; *Houghtaling v. Osborn*, 15 Johns. 115.

⁶⁷ *Thompson v. Church*, 13 Nebr. 287, 13 N. W. Rep. 626. See also *Hurford v. Omaha*, 4 Nebr. 386; *Perkins v. Jones*, 28 Wis. 248; *Weame v. Smith*, 33 Wis. 412.

⁶⁸ *Ecker v. First Nat. Bank*, 64 Md. 292, 1 Atl. Rep. 849.

In regard to other legal holidays, the general rule is that unless the statutes recognizing or creating them expressly prohibit the exercise of judicial functions upon them, the courts may validly render judgments and transact their other usual business. And even if they are declared non-judicial days, this will not hinder the performance of ministerial acts. Thus the statute in Georgia, declaring the fourth of July a holiday, does not inhibit the courts from sitting on that day, or make a judgment rendered on that day void, except when the day falls on Sunday.⁶⁹ So it is held that a judgment rendered by a justice of the peace on Thanksgiving Day is not void.⁷⁰ And in another case it was considered that in the absence of an express statute, the ministerial act of a clerk in filing a transcript of a judgment is not void because done on Christmas Day, but is a valid docketing of the judgment and will confer a valid lien upon the real estate of the debtor in the county where it is filed.⁷¹

§ 183. Judgment must be supported by the Pleadings.

A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered. A judgment not supported by the pleadings is as fatally defective as one not sustained by the verdict or finding.⁷² Hence the code, although it abolishes the forms of actions as they existed at common law, does not authorize a recovery, where the complaint alleges facts showing a cause of action in tort, by proving upon the trial a cause of action in contract.⁷³ So where the declaration is defective in substance to the extent of failing to show a cause of action, no judgment can be entered upon it.⁷⁴ This would be good ground for a motion in arrest, but if a judgment were nevertheless entered, it would be reversed for error. And if the complaint does not state facts sufficient to constitute a cause of action, a finding "that the allegations of the complaint are true," is not sufficient to support a judgment for the

⁶⁹ *Hamer v. Sears* (Ga.), 6 S. E. Rep. 810.

⁷⁰ *Bear v. Youngman*, 19 Mo. App. 41.

⁷¹ *In re Worthington*, 7 Biss. 455.

⁷² *Bachman v. Sepulveda*, 89 Cal. 698;

Marshman v. Conklin, 21 N. J. Eq. 546;

Parsley v. Nicholson, 65 N. Car. 207;

Frevert v. Henry, 14 Nevad. 191.

⁷³ *Degraw v. Elmore*, 50 N. Y. L.

⁷⁴ *Harris v. Harris*, 10 Wis. 467.

plaintiff.⁷⁶ But where a verdict is returned for the plaintiff on two counts in a declaration, one of which contains no cause of action, the court will render judgment upon the other, if legally sufficient.⁷⁷ But the fact that the defendant, at the trial, makes no objection to the form of action (as that one joint action is improperly brought instead of two several suits), cannot enable the court to enter a judgment which the law does not warrant.⁷⁷ In any action, process and pleadings are generally necessary, but where the parties are voluntarily before the court, and by agreement, consent, or confession (which are the same in substance) a judgment is rendered, such judgment is valid, although not granted according to the regular course of procedure.⁷⁸ So a judgment rendered without any complaint having been filed, is valid if entered by agreement or if ratified by subsequent consent.⁷⁹ A judgment or decree based upon incompetent evidence is never, for that reason alone, void.⁸⁰ And in general, mere *error* in a judgment, though it may be ground for its reversal, will not have the effect to make it absolutely *void*, or lay it open to collateral impeachment, or impair its efficacy while it stands.

§ 184. Judgment in Action not at Issue.

It has been held, in several cases in Mississippi, that judgments rendered without issues to be determined by them are nullities.⁸¹ And in some other states there are expressions to the effect that, before a cause is at issue, either expressly or tacitly, no final judgment can be validly rendered.⁸² Undoubtedly a judgment so pronounced would be irregular and erroneous, as being contrary to the course of law and the usual practice of the courts, and would therefore be liable

⁷⁶Knudson v. Curley, 30 Minn. 433, 15 N. W. Rep. 873. A judgment is not void or erroneous because the name of the plaintiff's attorney attached to the complaint is printed instead of being written. Hancock v. Bowman, 49 Cal. 413.

⁷⁷Gordon v. Downey, 1 Gill, 41.

⁷⁸Ellison v. Bank, 130 Mass. 48; Leonard v. Robbins, 13 Allen, 217.

⁷⁹Peoples v. Norwood, 94 N. Car. 167.

⁸⁰Gay v. Grant (N. Car.), 8 S. E. Rep. 99.

⁸¹Mann v. Martin, 14 Bush, 763.

⁸²Steele v. Palmer, 41 Miss. 88; Armstrong v. Barton, 43 Miss. 506; Porterfield v. Butler, 47 Miss. 170.

⁸³Braunsdorff v. Fay, 18 La. Ann. 187; DuBay v. Uline, 6 Wis. 588; Baltimore R. Co. v. Faulkner, 4 W. Va. 180.

to reversal. But whether it should be regarded as entirely void, a mere nullity, is a question involved in more difficulty. That no such result could properly follow is contended by Mr. Freeman, on the general principle that "when jurisdiction over both the parties and subject-matter is once obtained, no error committed in the exercise of that jurisdiction can make the proceedings or judgment of the court void."²² This may readily be conceded. And yet, in no proper sense can a court of law be said to have jurisdiction if there is no specific question or controversy submitted for its determination. It is not enough that the parties are properly in court. That does not give the tribunal power to adjudicate any and all matters of difference between them. When we speak of "jurisdiction of the subject-matter," we do not mean merely cognizance of the general class of actions to which the action in question belongs, but we also mean legal power to pass upon and decide the particular contention which the judgment assumes to settle. And how can a court acquire jurisdiction of the particular contention, except it be clearly marked out and precisely defined by the pleadings of the parties? And how can that be done, in any mode known to the law, save by the formation of a regular issue? There is therefore plausible ground for holding that if the record fails to show an issue to be determined, the judgment will be void on its face.

§ 185. Findings necessary to support the Judgment.

In some of the states there are statutes requiring a finding of facts and conclusions of law to be filed in the action, to serve as a basis for the judgment. But the disposition is to regard this requirement as not vitally necessary to the validity of the judgment. As to parties before the court, and respecting a matter within its jurisdiction, the cases hold that a judgment without a finding of facts to support it is not void, but at most merely erroneous and subject to

²²Freem. Judgm. § 185a. And in *Doyle v. Smith*, 1 Cold. 15, it is held that the want of a plea or issue constitutes at most but an error in the judgment,

but does not make it void, or affect the authority of the sheriff to execute writs which may be issued upon it.

reversal by a suitable proceeding in a tribunal having authority to review it.⁶⁴ So where a court of record, having jurisdiction, renders a judgment upon a petition filed before it against a defendant upon default of answer, and the statute requires the court in the particular proceeding to take evidence and make special findings, and the court fails to comply with the statutory requirement, the judgment may be erroneous but is not void.⁶⁵ And where a court, at the conclusion of a trial, has ordered judgment, but omits to make and file findings of fact and conclusions of law, as prescribed by statute, such findings and conclusions may be made and filed by the court after judgment *nunc pro tunc*.⁶⁶ But in Michigan it is held that a judgment entered up before the findings are finally completed and filed is premature, and is to be regarded as provisional action merely, which only becomes perfected when the findings are completed and filed.⁶⁷ If the findings are required to be specific, a general finding for the plaintiff will not support a judgment in his favor.⁶⁸

§ 186. Judgment must follow Verdict.

If the defendant in an action has recovered a verdict upon a plea which confesses the plaintiff's cause of action and does not sufficiently avoid it, judgment should be entered for the plaintiff notwithstanding the verdict.⁶⁹ Again, if the verdict is clearly wrong, this may furnish ground for arresting the judgment or granting a new trial.⁷⁰ But if no such reasons exist for disregarding or setting aside the verdict, the judgment, to be valid, must follow it and accord with it. We have already seen that this is an established rule in respect to the amount of the judgment.⁷¹ And it is here stated as a general principle. The necessity for its application chiefly arises

⁶⁴ Connolly v. Edgerton, 23 Nebr. 63, 34 N. W. Rep. 76. But in Michigan it is considered that such a judgment has no greater validity than a judgment rendered upon a jury trial without a verdict. Stansell v. Corning, 31 Mich. 242.

⁶⁵ Garner v. State, 28 Kana. 790.

⁶⁶ Swanstrom v. Marvin, 38 Minn. 359, 37 N. W. Rep. 455.

⁶⁷ People v. Judge of Circuit, 34 Mich. 62.

⁶⁸ Ladd v. Tully, 51 Cal. 377.

⁶⁹ *Supra*, § 16.

⁷⁰ *Supra*, § 104.

⁷¹ *Supra*, § 142.

in cases where special verdicts are returned. In Kentucky the code provides that "if a general and a special verdict are inconsistent, judgment shall be rendered pursuant to the latter." But it is held that the judgment should be rendered pursuant to the general verdict in all cases when the facts constituting the special finding are not inconsistent with the general verdict.⁸²

⁸²Quaid v. Cornwall, 18 Bush, 601.

CHAPTER XI.**THE VALIDITY OF JUDGMENTS AS AFFECTED BY THE CHARACTER OR STATUS OF THE PARTIES.**

- § 187. Against what Parties Judgments may be Rendered.
- 188. Judgments against Married Women at Common Law.
- 189. For Debt contracted *Dum Solo*.
- 190. Effect of Omission to plead Coverture.
- 191. Under partially enabling Statutes.
- 192. Statutes removing Disability of Coverture.
- 193. Judgments against Infants.
- 194. Service of Process on Infants.
- 195. Appearance by Attorney or Guardian.
- 196. Effect of Failure to plead Infancy.
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- 198. Infant Plaintiffs.
- 199. Judgments against Deceased Parties.
- 200. Judgment against Decedent Voidable only.
- 201. Death of One of Several Defendants.
- 202. Entry of Judgment against Decedent *Nunc pro Tunc*.
- 203. Jurisdiction must be acquired before Party's Death.
- 204. Judgment for Deceased Plaintiff.
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- 206. Joint Defendants at Common Law.
- 207. In Actions of Tort.
- 208. Joint Debtor Acts.
- 209. One Defendant suffering Default.
- 210. Judgment, when Several, when Joint.
- 211. Joint Judgment as an Entirety.
- 212. Confession of Judgment by Joint Defendants.
- 213. Misnomer of Parties.
- 214. *Descriptio Personæ*.

§ 187. Against what Parties Judgments may be Rendered.

Normally, all persons, natural or artificial, may be made defendants in a judgment. In theory of law, all persons who live under the protection of a particular sovereignty are subject to its laws and are within the power and authority of its courts, so far as their actions

come within the jural sphere. But the theory is modified to a certain extent by the technical rules relating to abnormal conditions of status. Persons who are under the various legal disabilities, though not exempt from the jurisdiction of the courts, are protected by special provisions as to the cases and the manner in which proceedings may be had against them. Their full and free personality, and therefore their accountability, is thus abridged by the peculiarity of their condition. The same is true, in even greater degree, of those whose personality is suspended, for juristic purposes, by natural or civil death. In respect to the latter, it no longer occupies a prominent place in the law, though there are still circumstances in which a man may be considered, strictly or by analogy, as *civiliter mortuus*. And where this doctrine still survives, it will always incapacitate the man from suing or being sued, and of course from being a debtor by judgment. Thus a judgment obtained against a man after the filing of his petition in bankruptcy could not create a lien upon his estate. "The court will inquire whether in fact the judgment was not entered after the petition was filed, and if so, will treat the judgment as of no more validity than if entered against a deceased person. So far as regards the disposition of his property, or the control of suits pending against him, the bankrupt, from the time his petition is filed, may be considered as *civiliter mortuus*."¹ In some of the states, the same suspension of personality, or civil death, is predicated of a felon confined in the penitentiary. Being dead in law, he cannot be sued, and if his conviction takes place and his sentence begins while an action is pending against him, a judgment afterwards rendered therein is null.² And during the existence of slavery, the law denied any juristic personality to the beings so held in bondage. Consequently, a judgment entered against a slave was considered as entirely destitute of any legal efficacy or validity.³

¹McLean v. Rockey, 8 McLean, 235.
And see International Bank v. Sherman, 101 U. S. 406.

²Rice County Comm'rs v. Lawrence, 29 Kans. 158; Neale v. Utz, 75 Va. 480.

³Wood v. Ward (U. S. Circ. Ct. S. D. Ohio), 8 Cent. L. Journ. 188.

§ 188. Judgments against Married Women at Common Law.

At common law, on account of the merger of the wife's personality in that of the husband, she was incapacitated for almost every species of juristic action. And therefore, being unable to bind herself by engagements, the breach of which would give rise to a cause of action, she could not, at law, be prosecuted to judgment. It is true that husband and wife might be sued jointly for the wife's tort. But this does not in reality change the rule, because the addition of the wife was (at common law) a matter of form only, the husband being the party who would be looked to for satisfaction of the judgment. Accordingly it is held, on common law principles, that a personal judgment against a married woman is void and a mere nullity.⁴ A promissory note, for example, signed by a *feme covert* cannot be enforced against her by any proceeding at law, and a judgment by default against her on such note is a nullity, and equity will enjoin the enforcement of it against her separate estate.⁵ The doctrine is stated, in its most strict and uncompromising form, in a West Virginia decision, as follows: A judgment rendered by a court of common law against a married woman, either in her own name or in the name of a company, under which she does business, upon a contract made during her coverture, is absolutely void, and an execution or suggestion sued out upon such judgment is invalid and ineffectual for any purpose, and the judgment may be attacked in any collateral proceeding.⁶ It was otherwise in equity. For there the wife was considered to have a separate personality for some purposes, and consequently she might be sued in chancery in respect to her separate estate. But even in those courts she could not walk with perfectly free foot, and safeguards were provided for her analogous to those obtaining at common law.⁷

⁴ *Morse v. Toppan*, 8 Gray, 411; *Higgins v. Peltzer*, 49 Mo. 152; *Weil v. Simmons*, 66 Mo. 617; *Griffith v. Clarke*, 18 Md. 457.

⁵ *Griffith v. Clarke*, 18 Md. 457.

⁶ *White v. Foote Lumber Co.*, 29 W. Va. 885, 1 S. E. Rep. 573.

⁷ See *O'Hara v. McConnell*, 98 U. S. 150.

§ 189. For Debt contracted *Dum Sola*.

If a suit is begun against a woman while she is sole, she cannot deprive the plaintiff of his remedy or abate the action, even at common law, by marrying; but the suit will proceed without any regard to her coverture, and a personal judgment may be rendered against her.⁹ The same is true if the suit, though not instituted until after marriage, is upon her debt contracted while single. That is, if the declaration shows that the contract was made while the defendant was a widow or sole, her coverture at the time of the suit is no obstacle to the recovery of such a judgment against her as might be rendered against any other defendant.⁹ This case is also specifically covered, in several of the states, by statutes which provide for and authorize a personal judgment against a married woman upon her contract made before marriage, to be enforced, however, only against her separate property.¹⁰ And in some others, the law provides that an action upon the wife's debt, contracted before the marriage, must be brought against the husband and wife jointly.¹¹ Dissolution of the marriage of course restores both parties to their former status. A judgment against a divorced wife for her debt, and also against the husband as to any property received by the marriage, if void as to him, cannot prejudice her and is not void as to her.¹²

§ 190. Effect of Omission to plead Coverture.

The most difficult question which has arisen in connection with this subject, and the one which has chiefly engaged the attention of

⁹ *Doyley v. White*, Cro. Jac. 828; *King v. Jones*, 2 Ld. Raym. 1525; *Evans v. Chester*, 2 Mees. & W. 847; *Cooper v. Hunchin*, 4 East, 521; *Roosevelt v. Dale*, 2 Cow. 581; *Phillips v. Stewart*, 27 Ga. 402; *Evans v. Lipscomb*, 28 Ga. 71; *Sackett v. Wilson*, 2 Blackf. 85; *Parker v. Steed*, 1 Lea, 206.

¹⁰ *Travis v. Willis*, 55 Miss. 557.

¹¹ Rev. Stat. Me. 1888, c. 61, § 4; Acts N. Y. 1853, c. 576, § 1; Acts Md. 1880, 253; Acts Va. 1875, c. 359, § 8; Rev. Stat.

W. Va. 1878, c. 123, § 10; Code N. Car. § 1823; Genl. Stats. Colo. § 2275; Comp. Laws Wyom. c. 82, § 7; 2 Rev. Stat. Ind. § 5127, construed in *Smith v. Beard*, 73 Ind. 159.

¹² Pub. Stats. R. I. c. 166, § 16; 2 Rev. Stat. Ind. § 5127; Acts Md. 1880, 253; Acts Va. 1875, c. 359, § 8; Rev. Stat. W. Va. 1878, c. 123, § 10; Genl. Stats. Colo. § 2275; Comp. Laws Wyom. c. 82, § 7.

¹³ *Joyes v. Hamilton*, 10 Bush, 544.

the courts, is this: What effect is to be given to a personal judgment rendered against a married woman, by default, in an action to which her coverture, if pleaded, would have been a complete defense? Is it a mere nullity, or is it voidable on motion, or is it merely erroneous? In some of the states, the doctrine is firmly held that such a judgment is absolutely void and may be so treated whenever it is brought in question.¹³ These decisions proceed upon the ground of the total disability of a *feme covert* to contract the species of debt assumed by the hypothesis, her incapacity to retain an attorney to appear and plead for her, and the consequent want of jurisdiction in the court for lack of a juristic person to act upon. Some of the decisions cited are ably considered and well reasoned.

On the other hand, it is held by a long line of authorities (including some English cases) that such a judgment against a married woman is *not void*, and even though erroneous or voidable, by reason of the absence of enabling statutes, is still valid and binding upon her in any collateral proceeding and until set aside or reversed in some proper manner.¹⁴ The practical importance of the question, it will be observed, comes to light when we inquire whether such a judgment may be impeached collaterally, and what is its effect upon third persons. For this will depend entirely upon whether it is void or voidable. And the decisions which hold it to be merely voidable

¹³ *Morse v. Toppan*, 8 Gray, 411; *Norton v. Meader*, 4 Sawy. 608; *Hartman v. Ogborn*, 54 Pa. St. 120, 98 Am. Dec. 679; *Graham v. Long*, 65 Pa. St. 388; *Swayne v. Lyon*, 67 Pa. St. 439; *Vandyke v. Wells*, 108 Pa. St. 49; *Griffith v. Clarke*, 18 Md. 457; *Davis v. Foy*, 15 Miss. 64; *Cary v. Dixon*, 51 Miss. 593; *Mallett v. Parham*, 52 Miss. 921; *White v. Bird*, 20 La. Ann. 281; *Parsons v. Spencer*, 88 Ky. 305; *Stevens v. Deering* (Ky.), 9 S. W. Rep. 292; *Higgins v. Peltzer*, 49 Mo. 152; *Weil v. Simmons*, 66 Mo. 617; *Corrigan v. Bell*, 78 Mo. 58.

¹⁴ *Dick v. Tolhausen*, 4 Hurl. & N. 695; *Moses v. Richardson*, 8 B. & C. 421; *Frazier v. Felton*, 1 Hawks, 281; *Green v. Branton*, 1 Dev. Eq. 504; *Vick v.*

Pope, 81 N. Car. 22; *Glover v. Moore*, 60 Ga. 189; *Mashburne v. Gouge*, 61 Ga. 512; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Phelps v. Brackett*, 24 Tex. 236; *Spalding v. Walthen*, 7 Bush, 659; *Chatterton v. Young*, 2 Tenn. Ch. 768; *Howell v. Hale*, 5 Lea, 405; *Sheppard v. Kendle*, 8 Humph. 81; *Keith v. Keith*, 26 Kans. 26; *Callen v. Ellison*, 18 Ohio St. 446; *McCurdy v. Baughman*, 48 Ohio St. 78, 1 N. E. Rep. 98; *Burk v. Hill*, 55 Ind. 419; *Wilson v. Coolidge*, 42 Mich. 112, 3 N. W. Rep. 285; *Vantilburg v. Black*, 3 Mont. 459; *Gambette v. Brock*, 41 Cal. 78; *Guthrie v. Howard*, 32 Iowa, 54; *Farris v. Hayes*, 9 Oreg. 81.

generally support their conclusion by a species of argument *ab inconvenienti*, namely, the harm that might accrue to innocent strangers if such judgments were to be treated as mere nullities. Thus the supreme court of California says: "There would be no safety in purchasing at judicial sales, under judgments rendered after due service of process on female defendants, if the title of the purchaser could be defeated by proof, in a collateral action, that the defendant in the judgment was a married woman at the time of the institution of the suit, or that she was incapable in law of contracting the debt for which the judgment was rendered."¹⁵ In order to reach this result it is necessary to agree that, no matter what the status of the woman may have been, if she was duly served with process, she was fully within the jurisdiction of the court, so that the judgment, though upon a contract which she had no power to make, would be at most erroneous as a matter of law. And this is the ground of the decision in the recent important case of *McCurdy v. Baughman*,¹⁶ where the court, after a critical and exhaustive review of the authorities, announced the doctrine stated at the beginning of this paragraph, and added: "Indeed, this is but to reassert the doctrine constantly maintained in this court, that 'the judgment or final order of a court having jurisdiction of the subject-matter and parties, however erroneous, irregular, or informal such judgment or order may be, is valid until reversed or set aside.'" In Alabama it is held that in the absence of fraud in its procurement, or other special cause shown, a *consent* decree is as binding on a married woman as on a person who is *sui juris*.¹⁷ In another state it is considered that as a judgment against a married woman *may* be valid (for it may be for her tort or for a debt contracted before marriage), in a proceeding to enforce such a judgment it should not be held conclusively to be void, but neither should the defendant be estopped from showing that it is void.¹⁸ And in Pennsylvania the court has lately held—though without departing from its earlier rulings—that a judgment by default against a married woman, in an action to which she might have pleaded coverture, is impervious to collateral attack, and voidable at most, when the pro-

¹⁵ *Gambette v. Brock*, 41 Cal. 78.

¹⁶ 43 Ohio St. 78, 1 N. E. Rep. 93.

¹⁷ *Winter v. City Council*, 79 Ala. 481.

¹⁸ *Parsons v. Spencer*, 88 Ky. 305.

ceeding was *in rem*, as, for the enforcement of a mechanic's lien.¹⁹

The solution of this vexed question must depend upon the view which we are to take of the common law status of a married woman. If it is merely a protection,—a barrier which she may raise in the path of one who pursues her at law, and which the courts are bound to erect in her behalf,—then it may readily be conceded that she may be brought within the jurisdiction by a proper service of process, so that the subsequent proceedings will at any rate not be void, although the court, to save itself from error, should not give a personal judgment against her on a debt she could defend against by coverture. This theory, however, is far from satisfactory as an account of the common law notion. The doctrine seems rather to have been that marriage, except for certain special purposes, put the *personality* of the wife entirely in abeyance. And therefore, in the generality of cases, her contracts and business transactions could have no validity whatever; for it is only a juristic person whose acts can have the effect of creating or transferring rights. For the same reason she would be beyond the authority of the courts,—as much so as the sovereign himself,—and no court could acquire jurisdiction of her (in the cases falling within our hypothesis), because process cannot issue except against a person known to the law as an individual. If, then, a suit was instituted against her, and she suffered a default, still no valid judgment could be given. The whole proceeding would be void *ab initio* and could result in nothing effectual. It seems to us that the vital point is clearly indicated in the following remark of the court of appeals of Kentucky: "If, as is unquestionably true, a judgment is void if the court rendering it had no jurisdiction for want of service of process, then it seems to us that it should be equally so if the one served with process is incapacitated by law from retaining an attorney, or has no such legal existence as authorizes a personal liability. In the one case the court has no jurisdiction, and in the other there is nothing within its jurisdiction which has a legal existence."²⁰

¹⁹Shryock v. Buckman, 121 Pa. St. 248, 15 Atl. Rep. 480.

²⁰Parsons v. Spencer, 83 Ky. 305. On

another appeal in the same case (Spencer v. Parsons, 18 S. W. Rep. 72), the court sustained its ruling by the fol-

§ 191. Under partially enabling Statutes.

Thus far we have considered the validity of judgments against married women at common law. It is now necessary to consider the enabling statutes which, both in England and in most of the states, have introduced the most important changes in their legal powers and relations. These statutes may be broadly divided into two classes, those which fully emancipate the wife, and those which release her only partially from the common law disabilities. Statutes of the latter class usually give the married woman power to make contracts with respect to her separate estate, to incur debts for its repair and improvement, to make herself liable for supplies for the maintenance of the family, and to sue and be sued in respect to such contracts and debts. It is generally held, under an enabling statute

lowing convincing line of argument. "Generally, a *feme covert* has no personality in law. She is not recognized by it save in a few excepted cases, so that a personal judgment can be taken against her. The contracts of an infant are in general voidable only, while those of a married woman are void. True, she may, under certain circumstances, bind her separate estate, but not herself personally; the reason being that she has no personal identity in law. It does not follow because, as an exceptional case, a personal judgment may go against her for tort, or upon a contract made by her when single, the reason being that her status at the making of it is regarded as following it to its completion, that therefore all personal judgments against her are merely erroneous, and not void. If she has no legal status in court, certainly it should have no jurisdiction to render a judgment binding her personally. Her existence is merged in that of the husband, and she can make no contract binding herself personally, or subjecting her to a judgment *in personam*. Her contract is void in law.

In equity, it may be enforced against her separate estate, if she so intended; but she incurs no personal liability by it, because she has, legally speaking, no personal existence, and it must be satisfied out of her estate by *in rem* proceedings. She is by law incapacitated from retaining an attorney, and no personal liability arises, because she has no legal existence. There is, therefore, so far as she is concerned, no person within the court's jurisdiction. If a personal judgment be rendered upon a claim, the alleged liability is merely placed upon an advanced footing, and if originally it was void as to her, then the unauthorized judgment should not estop her from resisting it, from the fact that she was not *sui juris*, and had no such legal existence as authorized a personal judgment. We are aware there is a conflict of authority in this country upon this question; but the views above advanced seem to us not only supported by reason, but we know they are sustained by such high authority as the supreme courts of Pennsylvania, Missouri, and other states."

allowing a married woman to charge her separate estate by certain kinds of contracts beneficial to herself or the estate, that a judgment against her, founded on such a contract, will be erroneous (or *void*, according to the doctrine prevailing in the particular state), unless the record itself shows that the debt is one for which her separate estate is liable.²¹ Thus, under a law in Pennsylvania, that a judgment against a wife in a joint action, so as to bind her separate estate, shall not be rendered unless it shall be proved that the debt sued for was contracted by the wife for necessities for the family, a default judgment which does not show that any testimony was taken is void.²² And in any case no *general* judgment can be given; it must be limited to the separate property of the wife in reference to which the contract was made.²³ In Alabama, the judgment must specify the property to be bound. "A general judgment, or a judgment which pretermits the ascertainment of the estate of the wife condemned to its satisfaction cannot be rendered. . . . There can be no personal judgment against the wife; the only judgment that can be rendered is a judgment *in rem*, a judgment of condemnation of the statutory estate described in the complaint."²⁴ So where an enabling statute allows her to bind her separate real estate, a judgment against the *land* is valid, but not a personal judgment against the woman.²⁵ And in an action against a married woman to dispossess her of lands, no personal judgment, either for damages or costs, can be rendered against her.²⁶ But her coverture does not prevent the rendition of a decree against lands descended to her, for contribution to the other heirs on account of a debt of the ancestor which they have paid.²⁷ Where a married woman is allowed to mortgage

²¹ *Lewis v. Perkins*, 36 N. J. Law, 133; *Swayne v. Lyon*, 67 Pa. St. 436; *Hecker v. Haak*, 88 Pa. St. 238; *Magruder v. Buck*, 56 Miss. 314; *Cary v. Dixon*, 51 Miss. 593; *Albree v. Johnson*, 1 Flipp. 341; *White v. Baillio*, 12 La. Ann. 663; *Robson v. Shelton*, 14 La. Ann. 712; *Trimble v. Miller*, 24 Tex. 214; *Menard v. Sydnor*, 29 Tex. 257; *McGlaughlin v. O'Rourke*, 13 Iowa, 459.

²² *Gould v. McFall*, 111 Pa. St. 66, 2

Atl. Rep. 403; *Brown v. McKinney* (Pa.), 18 Atl. Rep. 642.

²³ *Crockett v. Doriot* (Va.), 3 S. E. Rep. 128.

²⁴ *Lee v. Ryall*, 68 Ala. 354.

²⁵ *Sweeney v. Smith*, 15 B. Mon. 325, 61 Am. Dec. 188.

²⁶ *Steed v. Knowles*, 84 Ala. 205, 3 South. Rep. 897.

²⁷ *Winston v. McAlpine*, 65 Ala. 377.

her separate estate, but there is no statute allowing her to sue and be sued as a *feme sole*, the remedy is by charging the property in equity; but a personal judgment against her on the mortgage note is erroneous.²⁸ According to the law in Louisiana, a judgment against a married woman is void and of no effect when her husband has not been cited with her, and she is not authorized by him or by the judge to defend the suit.²⁹ As to confessions of judgment by married women, under these enabling statutes, the reader is referred to § 55 of this volume.

§ 192. Statutes removing Disability of Coverture.

In many of the states there are statutes which abolish all disabilities from coverture and allow a wife to sue and be sued in like manner as if she were sole.³⁰ In these states it is universally held that a personal judgment against a married woman, if otherwise regular, is as valid and binding as any other.³¹ Thus, where the property of a married woman is levied upon by her husband's cred-

²⁸ *Johnson County v. Rugg*, 18 Iowa, 187; *Wolff v. Van Metre*, 19 Iowa, 184; *Reed v. King*, 23 Iowa, 500; *Patton v. Stewart*, 19 Ind. 283; *Kirby v. Childs*, 10 Kans. 639; *Pemberton v. Johnson*, 46 Mo. 343; *Keating v. Korfhage*, 88 Mo. 524. The same is true of actions on mechanics' liens. *Burgwald v. Weipert*, 49 Mo. 60; *Seeman v. Weippert*, 49 Mo. 61.

²⁹ *Dirmeyer v. O'Hern*, 89 La. Ann. 961, 3 South. Rep. 182; *Washington v. Hackett*, 19 La. Ann. 146.

³⁰ Pub. Stats. Mass. c. 147, § 7; Genl. Laws N. H. c. 183, § 12; Acts Vt. 1884, c. 140, § 1; Code Civil Proc. N.Y. § 450; Rev. Stats. N. J. "Married Women," 10, 11; Act Pa. June 3, 1887, § 2 (P. L. 333); Rev. Stats. Ohio, § 4996; Rev. Stats. Ill. c. 68, § 1; Rev. Code Iowa, § 2563; Genl. Stats. Minn. c. 66, § 29; Comp. Laws Kans. c. 62, § 3; Comp. Stats. Nebr. pt. 1, c. 52, § 3; Acts Md. 1882, c. 265; Laws Oreg. 1878, p. 98, § 7; Genl. Stats. Colo.

§ 2279; Code Wash. § 2396; Code Civil Proc. Dak. § 77; Comp. Laws Wyom. 1882, c. 68; Code Miss. § 1167; Comp. Laws Utah, § 1021.

³¹ *Labaree v. Colby*, 99 Mass. 559; *Goodnow v. Hill*, 125 Mass. 587; *Vosburgh v. Brown*, 66 Barb. 421; *Cashman v. Henry*, 75 N. Y. 103, 31 Am. Rep. 437; *First Nat. Bank v. Garlinghouse*, 53 Barb. 615; *Wilson v. Herbert*, 41 N. J. Law, 454, 82 Am. Rep. 248; *Huff v. Wright*, 39 Ga. 41; *Glover v. Moore*, 60 Ga. 189; *Hart v. Grigsby*, 14 Bush. 542; *Jones v. Taylor*, 7 Tex. 240, 56 Am. Dec. 48; *Patrick v. Littell*, 36 Ohio St. 79, 33 Am. Rep. 553; *Van Metre v. Wolff*, 27 Iowa, 341; *Jones v. Glass*, 48 Iowa, 345; *Davis v. Bank*, 5 Nebr. 242, 25 Am. Rep. 484; *Rogers v. Weil*, 13 Wis. 664; *Platner v. Patchin*, 19 Wis. 333; *Leonard v. Townsend*, 26 Cal. 435; *Marlow v. Barlew*, 53 Cal. 456; *Alexander v. Bouton*, 55 Cal. 15.

itors as his property, and she interposes a claim, she is bound, just as any other suitor would be, by the judgment in the claim case.³³ So where she prefers a suit against her trustee to enforce the trust, or to charge the trustee with maladministration, she is concluded by a judgment against her.³⁴

§ 193. Judgments against Infants.

In respect to their legal disabilities, infants occupy a position analogous to that of married women. But the courts have shown a much stronger disposition to sustain judgments given against the former than those rendered against the latter. Assuming that an infant defendant has been brought before the court by a proper service of process, it is regular and orderly to appoint a guardian *ad litem* for him, who then assumes the defense of the action and protects the interests of the minor. But if a judgment is rendered by a court having jurisdiction of the parties and subject, it is held, by the great preponderance of authorities, that it will not be *void* because the defendant was an infant and no guardian *ad litem* was appointed, although it will be irregular and liable to reversal, or voidable on a proper proceeding for that purpose.³⁴ The theory is, that the appointment of a guardian is not a prerequisite to the jurisdiction of the

³³Lewis v. Gunn, 63 Ga. 542.

³⁴Rammelsberg v. Mitchell, 29 Ohio St. 22.

³⁵O'Hara v. McConnell, 98 U. S. 150; Tucker v. Bean, 65 Me. 352; Barber v. Graves, 18 Vt. 292; Crockett v. Drew, 5 Gray, 399; Austin v. Charleston Fem. Sem., 8 Met. 196; Swan v. Horton, 14 Gray, 179; Hill v. Keyes, 10 Allen, 258; Sims v. Dentistry College, 35 Hun, 344; Moore v. McEwen, 5 Serg. & R. 378; Kemp v. Cook, 18 Md. 180, 79 Am. Dec. 631; Roberts v. Stanton, 2 Munf. 129; Larkins v. Bullard, 88 N. Car. 35; Stancill v. Gay, 92 N. Car. 462; England v. Garner, 90 N. Car. 197; Finley v. Robertson, 17 S. Car. 435; Cook v. Rogers, 64 Ala. 406; Taylor v. Rowland, 26 Tex. 298; Montgomery v. Carlton, 56 Tex.

361; Martin v. Weyman, 26 Tex. 460; Simmons v. McKay, 5 Bush. 25; Allison v. Taylor, 6 Dana, 87; Walkenhorst v. Lewis, 24 Kans. 420; Trapnall v. Bank, 18 Ark. 58; Boyd v. Roane, 49 Ark. 397, 5 S. W. Rep. 704; St. Clair v. Smith, 8 Ohio, 355; Blake v. Douglas, 27 Ind. 416; Carver v. Carver, 64 Ind. 195; Peak v. Shasted, 21 Ill. 137, 74 Am. Dec. 83; Quigley v. Roberts, 44 Ill. 503; Bonnell v. Holt, 89 Ill. 71; Millard v. Marmon, 116 Ill. 649, 7 N. E. Rep. 468; Webster v. Page, 54 Iowa, 461, 6 N. W. Rep. 716; Drake v. Henshaw, 47 Iowa, 291; Powell v. Gott, 18 Mo. 458, 58 Am. Dec. 153; Stupp v. Holmes, 48 Mo. 89; Bailey v. McGinniss, 57 Mo. 363; Parker v. Starr, 21 Nebr. 680, 33 N. W. Rep. 424.

court; it attaches upon due service of the process being made. Consequently, the omission to appoint a guardian does not impair the authority of the court to proceed in the case, but is at most an irregularity in the exercise of its lawful jurisdiction, which, on settled principles of law, may impregnate its judgment with error, but cannot render it absolutely null. Very important results follow from the placing of such sentences in the category of voidable judgments, as distinguished from those which are entirely void. For, first, the judgment will stand as a valid adjudication, against the infant and all others who may be interested, until it is set aside or reversed.³⁵ Again, the omission to appoint a guardian *ad litem* will not vitiate the judgment on a collateral attack; it is only voidable by a direct proceeding.³⁶ And if it is set aside, the interest of a *bona fide* purchaser under the judgment without notice will not be affected.³⁷ And further, the avoidance of the judgment is at the election of the defendant; upon attaining his majority, he may execute a written release of errors, which will have the effect to confirm the judgment.³⁸ And while the courts will always be careful of the rights of infants, they will not in all cases set aside irregular judgments against them as of course; they will refuse to do so where it appears from the record or otherwise that the infant suffered no substantial injustice.³⁹ As respects proceedings to probate a will, no appointment of a guardian *ad litem* for any minor interested in the testator's estate is necessary, and the probate is valid, notwithstanding the omission of such appointment.⁴⁰

§ 194. Service of Process on Infants.

It is indispensable to the validity of a judgment against an infant that the record should show that he was made a party in some

³⁵ *England v. Garner*, 90 N. Car. 197; *Bernecker v. Miller*, 44 Mo. 102; *Simmons v. McKay*, 5 Bush, 25; *Frierson v. Travis*, 39 Ala. 150.

³⁶ *Millard v. Marmon*, 116 Ill. 649, 7 N. E. Rep. 468.

³⁷ *England v. Garner*, 90 N. Car. 197.

³⁸ *Hill v. Keyes*, 10 Allen, 258.

³⁹ *Syme v. Trice*, 96 N. Car. 243, 1 S.

E. Rep. 430; *McCroskey v. Parks*, 13 S. Car. 90; *Phillips v. Dusenberry*, 8 Hun, 848; *Bickel v. Erskine*, 43 Iowa, 213; *Fuller v. Smith*, 49 Vt. 253; *Rankin v. Kemp*, 21 Ohio St. 651; *Kemp v. Cook*, 18 Md. 130.

⁴⁰ *In re Mousseau's Will*, 30 Minn. 302, 14 N. W. Rep. 887.

legal and effectual mode.⁴¹ Ordinarily the statute requires that personal service be made upon the infant, if over the age of fourteen years (and sometimes upon the guardian also), and upon a parent, guardian, or person having charge of the minor, if under that age. This requirement is jurisdictional; the law must be strictly followed; and neither the infant nor his guardian can accept service, or waive the due service of process.⁴² The service, as stated, should be personal. But it is held in Kentucky, that a judgment against an infant constructively served, without the appointment of a guardian *ad litem*, is not void, but will stand good until set aside or reversed.⁴³ And where the statute provides for service on non-resident defendants by publication, service may be made in that manner upon non-resident infants.⁴⁴ It is clearly irregular to appoint a guardian *ad litem* until after the defendant has been duly brought before the court. Yet numerous cases hold that, although the infant was never personally served, or although the service was not in compliance with the statute, or was otherwise defective, still, if a guardian *ad litem* was appointed and an answer filed and the action defended, the judgment will not be void, though the defendant may have it reversed or set aside.⁴⁵ But some other authorities maintain the rule that where infant defendants are not served with process and do not appear,

⁴¹ *Shaefer v. Gates*, 2 B. Mon. 458, 88 Am. Dec. 164; *Abdil v. Abdil*, 26 Ind. 287; *Winston v. McLendon*, 43 Miss. 254.

⁴² *Lenox v. Notrebe*, 1 Hempst. 251. *Genobles v. West*, 23 S. Car. 154; *Young v. Young*, 91 N. Car. 359; *Winston v. McLendon*, 43 Miss. 254; *Taylor v. Walker*, 1 Heisk. 784; *Armstrong v. Wyandotte Bridge Co.*, 1 McCahon, 166; *Abdil v. Abdil*, 26 Ind. 287; *Clark v. Thompson*, 47 Ill. 25; *Good v. Norley*, 28 Iowa, 188; *Kansas City R. Co. v. Campbell*, 62 Mo. 585. "The mode of making infants parties to an action in a court of record is clearly and expressly prescribed by statute, and a due and tender regard for the rights and welfare of infants requires that this statute shall be strictly followed. An infant is incapable of making himself

or herself a party to an action by accepting service, so as to be bound by a judgment therein. All the formalities prescribed by statute must be complied with." *Finley v. Robertson*, 17 S. Car. 435.

⁴³ *Simmons v. McKay*, 5 Bush, 25.

⁴⁴ *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. Rep. 407; *Walkenhorst v. Lewis*, 24 Kans. 420.

⁴⁵ *Heroman v. Louisiana Institute*, 84 La. Ann. 805; *Robb v. Irwin*, 15 Ohio, 689; *Preston v. Dunn*, 25 Ala. 507; *Nelson v. Moon*, 8 McLean, 319; *Larkins v. Bullard*, 88 N. Car. 35; *Gronfier v. Puymirol*, 19 Cal. 629; *Cox v. Story*, 80 Ky. 64; *Gibson v. Chouteau*, 39 Mo. 586; *Kremer v. Haynie*, 67 Tex. 450, 8 S. W. Rep. 676.

the court has no authority whatever to appoint a guardian *ad litem* for them, and no jurisdiction as to them, and a judgment against them is utterly void.⁴⁶ There is something to be said in favor of this position, but both the preponderance of the cases and the drift of judicial thinking appear to be against it. In Illinois, it is held that if service is made upon the infant personally, instead of upon his guardian, as required by the statute, and no guardian *ad litem* appointed, the court is without jurisdiction.⁴⁷ Similarly, when the infant is under the age of fourteen years, and the summons is not served on his father, mother, guardian, or other person having charge of him, as the statute prescribes, it has been held that a judgment against him is void, and a sale of his land thereunder should be set aside.⁴⁸

Summarizing the conclusions reached in this and the preceding sections as sustained by the majority of the decisions, we may say that, in order that a judgment against an infant may be entirely regular and valid, *both* due service of process and the appointment of a guardian for the suit are necessary. But if (1) no service is had upon the defendant, but a guardian is appointed and defends, or if (2) the infant is within the jurisdiction of the court by personal citation, but no guardian is appointed for him,—in either of these cases, the judgment will be irregular and voidable, but not a mere nullity. If *neither* of these requisites is complied with, the judgment will ordinarily be utterly void. To the last statement, however, there may be exceptions in peculiar circumstances. In a case in North Carolina, where it appeared that there was no service of process upon infant defendants, and no guardian appointed to protect their rights, but they were brought in by an order directing them to be made parties with leave to answer, it was held that a judgment taken against them was irregular and might be set aside at any time, but it was not treated as a nullity.⁴⁹ But here we approach the

⁴⁶ Roy v. Rowe, 90 Ind. 54; Insurance Co. v. Bangs, 108 U. S. 485; Whitney v. Porter, 28 Ill. 445. See Galpin v. Page, 18 Wall. 350; Sprague v. Haines, 68 Tex. 215, 4 S. W. Rep. 371; McCloskey v.

Sweeney, 66 Cal. 53, 4 Pac. Rep. 943; Ingersoll v. Mangam, 84 N. Y. 622.

⁴⁷ Whitney v. Porter, 28 Ill. 445.

⁴⁸ Wornock v. Loar (Ky.), 11 S. W. Rep. 438; Civil Code Ky. § 52.

⁴⁹ Larkins v. Bullard, 88 N. Car. 35;

great principle, applicable to all persons alike, that jurisdiction over them is only acquired by service of process in some regular and recognized mode.

§ 195. Appearance by Attorney or Guardian.

Although the law does not regularly permit an infant to defend his case in person or by attorney, yet a judgment against an infant for whom no guardian was appointed, but who appeared by attorney, is voidable only and not void; it may be set aside on motion after he attains majority, or may be reversed on error.⁵⁰ In a case in California, where, in a suit against infants, there was no personal service upon them, but their general guardian appeared and defended for them, it was held that such appearance gave the court jurisdiction of their persons.⁵¹ And in many of the states a general guardian, already appointed, may appear for the minor,⁵² though in others a guardian *ad litem* must in all cases be appointed.⁵³

§ 196. Effect of Failure to plead Infancy.

The general disposition of the authorities is to regard the plea of infancy as a personal privilege, which may be waived, and if it is not pleaded, a judgment against the infant is binding upon him.⁵⁴ Still

Stancill v. Gay, 92 N. Car. 462. The Code, § 887, making valid judgments against infants and certain other persons, in cases where, being parties defendant, they are not personally served, does not apply to cases where there has never been any service upon the infant, nor upon any person representing him. *Id.*; *Perry v. Adams*, 98 N. Car. 167, 8 S. E. Rep. 729.

⁵⁰ *Powell v. Gott*, 18 Mo. 458, 58 Am. Dec. 153; *Beeler v. Bullitt*, 3 A. K. Mar. 280, 18 Am. Dec. 161; *Porter v. Robinson*, 3 A. K. Mar. 253, 18 Am. Dec. 153; *Bourne v. Simpson*, 9 B. Mon. 454; *Austin v. Charleston Fem. Sem.* 8 Met. 196, 41 Am. Dec. 497; *Bloom v. Burdick*, 1

Hill (N. Y.), 180, 37 Am. Dec. 299; *Barber v. Graves*, 18 Vt. 290; *Martin v. Weyman*, 26 Tex. 460; *Fullbright v. Camefox*, 30 Mo. 425; *Marshall v. Fisher*, 1 Jones (N. Car.), 111; *Whitney v. Porter*, 28 Ill. 445.

⁵¹ *Smith v. McDonald*, 42 Cal. 484.

⁵² *Weeks v. Smith*, 44 Miss. 296; *Mansur v. Pratt*, 101 Mass. 60; *Pierson v. Hitchner*, 25 N. J. Eq. 180; *Pucket v. Johnson*, 45 Tex. 550; *Gronfier v. Puy-mirol*, 19 Cal. 629; *Hinton v. Bland*, 81 Va. 588.

⁵³ *Roach v. Hix*, 57 Ala. 576; *Stammers v. McNaughton*, 57 Ala. 277; *Fitch v. Cornell*, 1 Sawy. 157.

⁵⁴ *Blake v. Douglass*, 27 Ind. 416.

there are some cases which hold,—on analogy to the rule obtaining in equity,—that a judgment by default cannot properly be rendered in any case against an infant.⁶⁵ But the better doctrine is that a judgment rendered upon default against an infant, after due and proper service of a summons upon him, though without the appointment of a guardian *ad litem*, is erroneous and voidable, but not void. And it is incumbent upon the infant, within a reasonable time after he attains his majority, having knowledge of the judgment, to take steps to avoid it, or he will be bound by his own acquiescence.⁶⁶

§ 197. Decrees in Equity against Infants.

In the courts of equity the rights and privileges of an infant are generally governed by the same rules as at law, except that chancery possesses, and will employ, larger and more diversified means of ascertaining and protecting his interests. In order to make a decree against a minor, the court must acquire jurisdiction of his person in some legal and regular manner. Thus where a decree was rendered against an infant whose guardian was an individual party to the bill, but not in his capacity as guardian, it was considered that the infant was not bound by the decree.⁶⁷ So also, a guardian *ad litem* should be appointed, just as at law. But though infant defendants may not have a guardian to protect their interests, yet a decree made against them is not for that reason void, but it will stand as valid until reversed.⁶⁸ However, if the decree, under such circumstances, is in favor of the infants, it is valid and cannot be attacked collaterally.⁶⁹ An important and invariable rule, which must be here noticed, is that

⁶⁵ Rhoads v. Rhoads, 48 Ill. 239; Peak v. Pricer, 21 Ill. 164; Chalfant v. Monroe, 8 Dana, 85; Massie v. Donaldson, 8 Ohio, 377; Metcalfe v. Alter, 81 La. Ann. 389. A counterclaim to the suit of an infant prosecuted by next friend cannot be taken as confessed for want of a reply. A guardian *ad litem* must be appointed for him and a reply filed, denying every material allegation in the counterclaim, and the circuit court

should see that this is done. Morris v. Edmonds, 48 Ark. 427.

⁶⁶ Eisenmenger v. Murphy (Minn.), 43 N. W. Rep. 784; Beckley v. Newcomb, 24 N. H. 359; *In re* Becker, 28 Hun. 207.

⁶⁷ Salter v. Salter (Ga.), 4 S. E. Rep. 391.

⁶⁸ Porter v. Robinson, 8 A. K. Mar. 253, 18 Am. Dec. 153; Beeler v. Bullitt, 8 A. K. Mar. 280, 18 Am. Dec. 161.

⁶⁹ Hanna v. Spotts, 5 B. Mon. 363, 43 Am. Dec. 132.

equity will require an investigation of the merits in every case where infants are concerned; it will not rest satisfied with the fact that no defense is set up; neither will it suffer a guardian to admit away the rights of the ward. Hence a decree cannot pass *pro confesso* against an infant.⁶⁰ A similar rule governs the case of consent decrees. "Where infants are concerned, the court will not make a decree by consent, without first referring it to the master to ascertain whether it is for their benefit. But when once a decree has been pronounced without that previous step, it is considered as of the same authority as if it had been referred to the master, and he had made a report thereupon that it would be for their benefit."⁶¹ According to the practice followed in many jurisdictions, a decree against an infant is first entered *nisi*; and a day is given him, after he shall attain full age, to come in and show cause against making the decree absolute. If he omits to do so, the decree becomes final and he is conclusively bound by it.⁶² But whether the omission of the court to secure this privilege to the infant will invalidate the decree, wholly or in part, is not so clear upon the authorities. The cases seem to agree that a decree made absolute in the first instance would not be void, although it might be voidable.⁶³ And there are decisions to the effect that

⁶⁰ *Lane v. Hardwicke*, 9 Beav. 148; *Bank of U. S. v. Ritchie*, 8 Pet. 128; *Walton v. Coulson*, 1 McLean, 120; *Tucker v. Bean*, 65 Me. 352; *Dow v. Jewell*, 21 N. H. 470; *Mills v. Dennis*, 8 Johns. Ch. 367; *Wright v. Miller*, 8 N. Y. 9; *Thompson v. McDermott*, 19 Fla. 892; *Jones v. Jones*, 56 Ala. 612; *Daily v. Read*, 74 Ala. 415; *Hooper v. Hardie*, 80 Ala. 114; *Wells v. Smith*, 44 Miss. 296; *McIlvoy v. Alsop*, 45 Miss. 365; *Johnson v. McCabe*, 42 Miss. 255; *Greenwood v. New Orleans*, 12 La. Ann. 426; *Massie v. Donaldson*, 8 Ohio, 377; *Chaffin v. Kimball*, 23 Ill. 86; *Reddick v. Bank*, 27 Ill. 145; *Enos v. Capps*, 12 Ill. 255; *Hamilton v. Gilman*, 12 Ill. 260; *Turner v. Jenkins*, 79 Ill. 228; *Quigley v. Roberts*, 44 Ill. 508; *Rhoads v. Rhoads*, 43 Ill. 239; *Hanna v. Spotts*, 5 B. Mon. 362; *Cowan v. Anderson*, 7 Coldw. 191; *Heath v. Ash-*

ley, 15 Mo. 893; *English v. Savage*, 5 Oreg. 518; *Burt v. McBain*, 29 Mich. 260; *Barker v. Hamilton*, 8 Colo. 291.

⁶¹ *Dow v. Jewell*, 21 N. H. 470, 487.

⁶² *Wright v. Miller*, 1 Sandf. Ch. 108, 59 Am. Dec. 447; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291; *Long v. Mulford*, 17 Ohio St. 484; *Cox v. Story*, 80 Ky. 64; *Kuchenbeiser v. Beckett*, 41 Ill. 172; *Seward v. Clark*, 67 Ind. 289; *Simpson v. Alexander*, 6 Coldw. 619; *Coffin v. Heath*, 6 Met. 76; *Dow v. Jewell*, 21 N. H. 470.

⁶³ *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97; *Anderson v. Irvine*, 11 B. Mon. 341; *Creath v. Smith*, 20 Mo. 118; *Hanna v. Spotts*, 5 B. Mon. 362, 48 Am. Dec. 132; *Joyce v. McAvoy*, 81 Cal. 278, 89 Am. Dec. 172; *Field v. Williamson*, 4 Sandf. Ch. 618.

such a decree would be set aside on the application of the infant, after his majority, as by bill of review; on the ground that the infant defendant has an absolute and indefeasible right to show cause against the decree.⁶⁴ But the weight of the authorities is against this contention. The general disposition is to regard such a decree as valid and conclusive. "An infant defendant is as much bound by a decree in equity against her as a person of full age; and therefore if there be an absolute decree against a defendant who is under age, she will not be permitted to dispute it, unless upon such grounds as an adult might have disputed it, as fraud, collusion, or error."⁶⁵

§ 198. Infant Plaintiffs.

Regularly an infant can sue only by his guardian or by next friend. But it is held that a minor who has commenced and prosecuted an action to judgment is bound by the result.⁶⁶ And as a general rule infant plaintiffs are as much bound by a decree as persons of full age. But they are not so bound in a proceeding by an official plaintiff, though they are styled relators, without the intervention of a *prochein ami*.⁶⁷

§ 199. Judgments against Deceased Parties.

At the common law an action was abated by the death of a sole plaintiff or defendant. And in some of the states the doctrine appears to be irrevocably settled that a judgment against a person who was dead at the time of its rendition is absolutely null and void.⁶⁸

⁶⁴ *Beeler v. Bullitt*, 4 Bibb, 11; *Wright v. Miller*, 4 Barb. 600; *Harris v. Youman*, 1 Hoffm. Ch. 178; *Townsend v. Cox*, 45 Mo. 401; *Coffin v. Heath*, 6 Met. 76; *Lloyd v. Malone*, 23 Ill. 43.

⁶⁵ *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291; *English v. Savage*, 5 Oreg. 518; *In re Hogton*, L. R. 18 Eq. 578; *In re Livingston*, 34 N. Y. 555; *Rivers v. Durr*, 46 Ala. 418; *McLemore v. Railroad*, 58 Miss. 514; *Marshall v. Fisher*, 1 Jones (N. Car.), 111; *Smith v. Mc-*

Donald, 42 Cal. 484; *Wills v. Spraggin*, 3 Gratt. 567; *Martin v. Weyman*, 26 Tex. 460; *Allman v. Taylor*, 101 Ill. 185; *Lloyd v. Kirkwood*, 112 Ill. 829; *Simmons v. Goodell*, 63 N. H. 458, 3 Atl. Rep. 897; *Ashton v. Ashton*, 35 Md. 496.

⁶⁶ *Gray v. Widner* (Cal.), 20 Pac. Rep. 47.

⁶⁷ *Becton v. Becton*, 3 Jones Eq. 419.

⁶⁸ *New Orleans & C. R. Co. v. Bosworth*, 8 La. Ann. 80; *Norton v. Jamison*, 23 La. Ann. 102; *Edwards v. Whit-*

It is said in a recent case in Illinois: "A careful examination of the authorities clearly shows that a judgment by the common law, in the absence of any statutory provisions on the subject, against a dead person, either natural or artificial, is absolutely void, and the fact that service may have been obtained, or the suit commenced, before the death of the party, makes no difference in this respect."⁶⁶ So in the practice of the appellate courts; an order or judgment rescinding an order of appeal previously obtained by a party to a suit will be annulled and set aside, as void, if it appears that the rescinding order was rendered after the death of the party who had obtained the appeal.⁶⁷ Nor is the judgment saved by the fact that the defendant's sole executor was also a defendant in the same action, if he was joined in his individual capacity.⁶⁸ In Pennsylvania the courts have not committed themselves to this extreme view. Still they hold that a judgment against a defendant who was dead at the time of its entry,—this fact appearing of record,—will be stricken off.⁶⁹ And so a judgment entered on a warrant of attorney after the death of the defendant should be stricken off.⁷⁰ The consequences of holding the doctrine of the absolute nullity of the judgment, in these circumstances, are most important. For in the first place, no one would be imperilled by entirely disregarding it. It would be unnecessary for the representatives of the decedent, or his creditors, or any other persons interested, to take any measures to have the judgment vacated or reversed. Whenever it came in question, directly or collaterally, for whatever purpose presented, it might be attacked and overturned by proof of the defendant's death before its rendition. Neither could it operate as a source or support of any title or right, nor as the means of divesting any interest. Neither would it be binding as an adjudication.

ed, 29 La. Ann. 647; *Lee v. Gardiner*, 26 Miss. 521; *Parker v. Horne*, 38 Miss. 215; *Tarleton v. Cox*, 45 Miss. 480; *Colson v. Wade*, 1 Murph. (N. Car.) 48; *Burke v. Stokeley*, 65 N. Car. 569; *Carter v. Carriger*, 8 Yerg. 411, 24 Am. Dec. 583; *Morrison v. Deaderick*, 10 Humph. 343; *Collins v. Knight*, 8 Tenn. Ch. 187; *McCreery v. Everding*, 44 Cal. 284;

Lynch v. Tunnell, 4 Harringt. 284; *Meyer v. Hearst*, 75 Ala. 390.

⁶⁶ *Life Association v. Fassett*, 102 Ill. 815, 325.

⁶⁷ *Succession of Hoggatt*, 36 La. Ann. 887.

⁶⁸ *Bragg v. Thompson*, 19 S. Car. 572.

⁶⁹ *Tobias v. Dorsey*, 2 Week. Notes Cas. 15.

⁷⁰ *Lanning v. Pawson*, 38 Pa. St. 480.

cation of rights. No person could be estopped or concluded by its findings. And this is logically the state of the law in those jurisdictions where this view is adopted. But, as will appear from the following section, it is by no means universal.

§ 200. Judgment against Decedent Voidable only.

The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject-matter and the persons, during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, *not void* nor open to collateral attack.⁷⁴ A late important case declares that "the decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding, it is valid."⁷⁵ So in Minnesota: "While the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action in which the error occurs, and the judgment rendered after the party's death, though erroneous, is not on that account to be attacked in a collateral action. In other words the judgment is voidable when properly assailed, but not void."⁷⁶ For illustration, where the accounts of an administrator are

⁷⁴ *Loring v. Folger*, 7 Gray, 505; *Reid v. Holmes*, 127 Mass. 326; *West v. Jordan*, 62 Me. 484; *Holt v. Thacher*, 52 Vt. 592; *Yaple v. Titus*, 41 Pa. St. 195, 80 Am. Dec. 604; *Carr v. Townsend*, 68 Pa. St. 202; *Livingston v. Rendall*, 59 Barb. 493; *Hoce v. Barber*, 4 Hen. & M. 439; *Neale v. Utz*, 75 Va. 480; *Collins v. Mitchell*, 5 Fla. 364; *Powell v. Washington*, 15 Ala. 803; *Milam Co. v. Robertson*, 47 Tex. 222; *McClelland v. Moore*, 48 Tex. 355; *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336; *Fleming v. Seeligson*, 57 Tex. 524; *Spalding v.*

Wathen, 7 Bush, 659; *Case v. Ribelin*, 1 J. J. Mar. 30; *Swasey v. Antram*, 24 Ohio St. 87; *Stoetzell v. Fullerton*, 44 Ill. 108; *Clafin v. Dunne* (Ill.), 21 N. E. Rep. 384; *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229; *Webber v. Stanton*, 1 Mich. N. P. 97; *Jennings v. Simpson*, 12 Nebr. 553; *Hayes v. Shaw*, 20 Minn. 405 (Gil. 355); *Berkey v. Judd*, 27 Minn. 475, 8 N. W. Rep. 383.

⁷⁵ *Mitchell v. Schoonover*, 16 Oreg. 211, 17 Pac. Rep. 867.

⁷⁶ *Stocking v. Hanson*, 22 Minn. 543; *Hayes v. Shaw*, 20 Minn. 405, (Gil. 355.)

settled and filed in the proper court in his lifetime, showing a balance due the estate, the court thereby acquires personal jurisdiction, and a judgment rendered after his death, confirming the report and directing payment of the sum in his hands, is not void when attacked collaterally in a suit against the surety on his bond, though the judgment might have been reversed on appeal.⁷⁷ So a judgment rendered when both the plaintiff and defendant are dead is erroneous; but relief can only be had by petition in the nature of a bill of review, or for a new trial, or by motion to set aside the judgment.⁷⁸ A judgment may be entered up, after the defendant's death, on an agreement for judgment made by him in his lifetime, but execution cannot issue without a *scire facias* to his executors.⁷⁹ On similar principles, a judgment rendered against a corporation after its dissolution by an act of the legislature is erroneous but not void.⁸⁰ The English statute provides that judgment may be entered up on a verdict within two terms after the death of the party against whom the verdict was given. But it is held that a judgment is valid, although not entered within that time, if the verdict was returned during the life of the party, and the delay was occasioned by a motion touching an award.⁸¹

The *object* of setting aside a judgment rendered against a party who died before the verdict, is to give his representatives an opportunity to resist a recovery. For otherwise the plaintiff might profit by the accidental circumstance, and the consequent cessation of opposition, to secure a judgment to which he was not entitled.⁸² The *method* of avoiding the effect of the judgment will depend somewhat upon the state of the record, and will also vary in the different jurisdictions. The rule established by the supreme court of Nebraska, however, commends itself as both reasonable and practical. There a judgment rendered against a person (and equally so of one rendered in his favor) after his death, is reversible if the fact and time of death appear on the record, or in error *coram nobis*; if the fact

⁷⁷ *Beard v. Roth*, 85 Fed. Rep. 397.

⁷⁸ *McClelland v. Moore*, 48 Tex. 355.

⁷⁹ *Webb v. Wiltbank*, 1 Clark (Pa.), 302.

⁸⁰ *Merrill v. Suffolk Bank*, 81 Me. 57, 50 Am. Dec. 649.

⁸¹ *Bridges v. Smyth*, 8 Bing. 29.

⁸² *Lynn v. Lowe*, 88 N. Car. 478.

must be shown *aliunde*, it is voidable and not void and cannot be impeached collaterally.⁵³ The writ of error *coram nobis* has fallen into desuetude in most of the states. But probably a motion in the court where the record remains, with due notice, and supported by affidavits, would be everywhere recognized as a proper proceeding to procure the vacating of a judgment objectionable on this ground but not disclosing the fact of death.

It is also to be observed that the validity of judgments, in these circumstances, will sometimes be helped by the fiction of relation. In an English case, where a judgment was signed at the opening of the office at its usual hour, 11 A. M., and the defendant died at 9:30 on the same morning, the judgment was held regular, on the principle that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done.⁵⁴ And in an early Massachusetts decision it was said: "By the common law, all proceedings in a suit at law are stopped by the death of one of the parties. If either of them die before judgment, no judgment can be entered; if after judgment, no execution can issue. But to avoid the inconvenience of this principle, the doctrine of relation has been resorted to; so that if judgment be not actually entered in court, or signed in vacation, as is the practice in England, and either party die, the judgment shall be considered as entered on the first day of the term, and an execution may issue bearing *teste* of that day, so as to save the fruits of a judgment to the party entitled to it. But this practice proves the general principle as first stated, and that it was necessary to resort to fiction in order to avoid the effect of that principle."⁵⁵ It must be added that if the personal representatives of a deceased defendant were duly made parties to the proceeding previous to the judgment, it is not enough to vitiate the judgment that it is entered against the dead man by name, instead of against the representatives, for the error is merely clerical.⁵⁶

⁵³ *Jennings v. Simpson*, 12 Nebr. 558, 11 N. W. Rep. 580; *McCormick v. Pad-dock*, 20 Nebr. 486, 80 N. W. Rep. 602.

⁵⁴ *Wright v. Mills*, 4 Hurl. & N. 488.

⁵⁵ *Hildreth v. Thompson*, 16 Mass. 191.

⁵⁶ *Stackhouse v. Zuntz (La.)*, 6 South. Rep. 666.

§ 201. Death of One of Several Defendants.

By an extension of the principles stated in the preceding section, it is held that where, in a joint action, one defendant dies before judgment, and his death is not suggested on the record, and judgment is rendered against all the defendants, the judgment is voidable only, not void, and is not open to collateral attack, although it may be vacated on motion.⁸⁷ However, in some of the states, where the strict rule prevails in the case of a sole defendant, it is also held that a judgment against several, one of whom was dead at its rendition, is void and a nullity.⁸⁸ Whether the judgment is void or merely voidable in respect to the deceased defendant, an important and difficult question arises as to its effect upon the surviving defendants. If void as to one, is it void as to all? If voidable as to one, must it be vacated as to all? Some of the cases hold that although a judgment or decree taken against a person by name, then dead, jointly with others, may be void as to the decedent, it would *prima facie* be good as to the other defendants.⁸⁹ But there are also decisions to the effect that such a judgment cannot be permitted to stand even against the survivors.⁹⁰ The solution of this question must ultimately depend upon whether a joint judgment is to be considered an *entirety* or not,—a point which will be discussed in a subsequent section.⁹¹ For obviously, if the judgment is an entire thing and not susceptible of division, the fact that one of the defendants is dead is error which must cause it to be entirely set aside.

⁸⁷ King v. Burdett, 28 W. Va. 601, 57 Am. Rep. 687; Boor v. Lowrey, 108 Ind. 468, 8 N. E. Rep. 151; Burke v. Stokely, 65 N. Car. 569. A judgment which passes by operation of law upon the return of a forfeited forthcoming bond is not vitiated by the fact that one of the obligors is dead and incapable of suffering a judgment, but is valid as to

the surviving obligors. Moody v. Harper, 38 Miss. 599.

⁸⁸ McCloskey v. Wingfield, 29 La. Ann. 141.

⁸⁹ Collins v. Knight, 8 Tenn. Ch. 188.

⁹⁰ Lewis v. Ash, 2 Miles (Pa.), 110. Compare Hartman v. Hesserich, 8 Week. Notes Cas. 488.

⁹¹ *Infra*, § 211.

§ 202. Entry of Judgment against Decedent *Nunc Pro Tunc*.

There is one case in which a judgment against a dead man is of unquestionable validity, namely, where it is entered *nunc pro tunc* as of a time when he was alive. The power to make such entries is within the common law authority of the courts, and it may be exercised in cases where the defendant dies in the interval between the finding of a verdict and the entry of judgment upon it, provided that the delay was not caused by the laches of the other party, but was attributable to the act of the court, in advising or deliberating upon the case after its submission, or to its being tied up by a motion for a new trial or similar proceeding. Under these circumstances, in furtherance of justice, and to prevent the successful party from being deprived of the fruits of the judgment to which he is entitled, the court will order it to be entered as of the time when the verdict was returned or the cause submitted.⁸² So where a garnishee has answered, and the cause is continued, and he dies before the entry of judgment, judgment may be rendered against him as of the term when he made his disclosure.⁸³ This subject has already been considered in detail.⁸⁴

§ 203. Jurisdiction must be acquired before Party's Death.

If the court has jurisdiction of the parties and the subject-matter, and the defendant, after having appeared and pleaded, dies, the judgment subsequently entered against him will at most be voidable, and may in some cases be made entirely valid by retroactive entry. But it is essential that jurisdiction should have attached during the defendant's life; and if the action is commenced against one already dead, the judgment will be absolutely *void* for want of jurisdiction.⁸⁵

⁸² Where the death of either party is suggested after verdict, judgment may be entered as of the term when the verdict was rendered. *Lewis v. Soper*, 44 Me. 72.

⁸³ *Hall v. Harvey*, 8 N. H. 61.

⁸⁴ *Supra*, §§ 126-130.

⁸⁵ *Reid v. Holmes*, 127 Mass. 326; *Lo-*

§ 204. Judgment for Deceased Plaintiff.

In regard to the validity of a judgment rendered in favor of a plaintiff, after his death, the books contain contradictory expressions. Some cases hold that such a judgment is not void, but voidable at most, cannot be collaterally impeached, and is valid until reversed or vacated.⁶⁶ Other decisions regard it as a mere nullity, invalid for every purpose, and liable to be overturned whenever and wherever brought in question.⁶⁷ In order to arrive at just conclusions on this point, it is necessary to take into account the time or stage of the cause at which the decease of the plaintiff occurs. And first, if an action is commenced in the name of a person already dead (as where the decedent is the nominal plaintiff, and the one for whose benefit the suit is prosecuted is the real party in interest), or if one of several joint claimants is dead before action brought, it is held that the defendant must take advantage of the fact by plea in abatement, at the peril of being estopped by his silence, and the judgment for plaintiff will not be disturbed.⁶⁸ But it may also happen that the plaintiff dies during the pendency of the suit and before verdict. In this case, supposing the cause of action to be one which survives, the regular practice is to revive the action in favor of his personal representatives. But if this is omitted, and the suit proceeds to judgment in the name of the decedent, it is more reasonable to hold it voidable only than to consider it entirely null. For the case cannot be distinguished in principle from that of a defendant dying while the action is pending, where, as already shown (§ 200), the great preponderance

ring v. Folger, 7 Gray, 505; Griswold v. Stewart, 4 Cow. 457; Crosley v. Hutton (Mo.), 11 S. W. Rep. 618; Claflin v. Dunne (Ill.), 21 N. E. Rep. 884.

⁶⁶ Hayes v. Shaw, 20 Minn. 405, (Gil. 355; Kennedy v. Pickering, Minor, 187; Webber v. Stanton, 1 Mich. N. P. 97.

⁶⁷ Young v. Pickens, 45 Miss. 558; Tarleton v. Cox, 45 Miss. 490. Where a sole plaintiff dies during the pendency of the suit, a judgment rendered in his name is a nullity, and the court in

which it was rendered may set it aside at a subsequent term and re-instate the cause on the docket. Moore v. Easley, 18 Ala. 619. An order of revivor upon the plaintiff's death must be served upon the defendant like an original summons, or the subsequent judgment will be void. Amyx v. Smith, 1 Met. (Ky.) 529.

⁶⁸ Baragwanath v. Wilson, 4 Ill. App. 80; Powell v. Washington, 15 Ala. 808.

of authority sustains the rule that the judgment is at least impervious to collateral attack and must be vacated or reversed by proper proceedings. Both cases are equally governed by the principle that when once the jurisdiction of the court has attached, no subsequent error or irregularity in the exercise of that jurisdiction can make its judgment void. Yet it would be too much to predicate entire validity of the judgment in the case supposed. Undoubtedly it would be irregular, and the court would vacate it on a proper application.⁹⁹ If the plaintiff dies after a verdict, or after trial and submission to the court, it is proper to enter judgment *nunc pro tunc* as of the date of the verdict or submission. But if the judgment is entered as of the actual date when rendered, it is not void, and suit may be brought upon it by the personal representative of the deceased plaintiff.¹⁰⁰ "As to rendering judgment on a verdict found before the death of the plaintiff," says the court in Missouri, "our statute expressly authorizes it, notwithstanding his subsequent death, and the statute is merely a codification of the common law, which never allows a delay occasioned by the court to change the condition of a suit."¹⁰¹ Still,

⁹⁹ In *Broas v. Mersereau*, 18 Wend. 653, it was held that a verdict may be taken after the death of a sole plaintiff, where the death happens on the first day of the circuit. This on the theory that "the whole time of the circuit relates to the first day, so that if the party die on any day during the circuit, though before the trial, this is regarded as a death after verdict."

¹⁰⁰ *Webber v. Stanton*, 1 Mich. N. P. 97. See *Gilman v. Donovan*, 53 Iowa, 362, 5 N. W. Rep. 560. After a verdict was found for the plaintiff in an action, certain questions of law were reserved, but upon a hearing judgment was rendered on the verdict. In the mean time the plaintiff had died, but this fact being unknown to his counsel, the execution was issued in his favor. The court, upon the execution being returned unexecuted and cancelled, vacated the judgment and permitted the administrator to come in and prosecute the ac-

tion, it appearing that the rights of third persons would not be affected thereby. *Stickney v. Davis*, 17 Pick. 169.

¹⁰¹ *Horner v. Nicholson*, 56 Mo. 236, citing Wagn. Mo. Stat. 1050, § 7. But this view does not go uncontradicted. In the case of *West v. Jordan*, 63 Me. 484, it appeared that plaintiff and her husband brought case for personal injuries to her, there was a verdict for plaintiff, the defendant moved to set aside the verdict, then the plaintiff died. The motion was overruled, and the clerk entered up judgment as of the then current term. Afterwards the husband took out administration on the plaintiff's estate, and moved the court to bring forward the action "that the proper judgment may be made up." The court then made an entry reciting the death of the plaintiff, withdrawal and discontinuance as to the husband, his appearance as administrator, and

the better practice clearly is to enter the judgment as of the term in which the verdict was returned.¹⁰² It is also to be remarked that a judgment may be *amended* so as to show that, instead of being rendered in favor of the deceased plaintiff, it was really rendered in favor of his personal representatives, and this may be done without notice to the defendant, or after his death.¹⁰³ Finally, if the court renders judgment during the lifetime of the plaintiff, the clerk may perform the ministerial act of entering and recording it after his death.¹⁰⁴

§ 205. Judgments against Insane Persons.

An insane person may be sued and jurisdiction over him acquired by the like process as if he were of sound mind. But when it is made to appear to the court that a party to the suit is insane, it is the duty of the court to appoint a guardian *ad litem* for him, or to have his committee or conservator made a party. "And no doubt it is the duty of a plaintiff who sues an insane person, if he has knowledge of the insanity, to inform the court thereof. But the failure to perform any of these duties does not affect the jurisdiction of the court, but only the regularity of the proceedings. Therefore it is, that the judgment of a court having jurisdiction of the subject-matter of the suit, and of the person of such a party, notwithstanding such irregularity, is not absolutely void."¹⁰⁵ On this principle, it is held by all the courts that a judgment against a person who was *non compos mentis* at the time of its rendition, though without joining his legal guardian, is binding and conclusive upon him, is not to be impeached in any collateral action, and stands as a valid adjudication until annulled or reversed in some direct proceeding for that purpose.¹⁰⁶ "The only question presented in this case is, whether a

judgment on the verdict. The defendant objected that there was already one judgment standing against him, and he might be doubly liable. But it was held that the first judgment was absolutely invalid, and at any rate the old record was effectually vacated by the allowance of the motion to bring forward.

¹⁰² *Goddard v. Bolster*, 6 Me. 427, 20 Am. Dec. 320.

¹⁰³ *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 434; *Dawson v. Hardy*, 33 Tex. 198.

¹⁰⁴ *Franklin v. Merida*, 50 Cal. 289.

¹⁰⁵ *Johnson v. Pomeroy*, 31 Ohio St. 247.

¹⁰⁶ *Beverley's Case*, 4 Co. 123; *Mans-*
(243)

judgment by default against a lunatic, upon service of process on him alone, be void because his committee was not a party; and it is our opinion that, though evidently erroneous, the judgment is not void."¹⁰⁷ So in New Hampshire: "The fact that a person against whom a suit is commenced is, at the service of the process upon him, a person of insane mind, and that he so continued until judgment rendered, and that he appeared in person or by attorney, or not at all, is good cause to reverse the judgment upon a writ of error; though for reasons which we think inapplicable and without force here, and perhaps little credible to the jurisprudence of an enlightened country, it seems not to have been so held in England. But in such case the defect in the proceedings renders them only voidable and not void."¹⁰⁸ That a person of unsound mind should be irrevocably bound by proceedings of which he could have no intelligent consciousness seems a legal anomaly. It is true a court may acquire jurisdiction of his person, but only in the sense that it obtains jurisdiction of a chattel, for example, by its attachment. And the unfortunate defendant lacks those means of defending himself and of challenging the claims asserted against him which justice dictates as the inviolable right of every person. We should therefore expect that a judgment against him would be regarded at least as voidable by the court which pronounced it. And this is undoubtedly the better doctrine, and the one prevailing in most of the states,¹⁰⁹ although there are some cases which hold that such a judgment is not even voidable, and that no relief can be had against it except by an application to chancery for an injunction against its enforcement.¹¹⁰ And it will be remembered that a court of equity would in such a case

fields's Case, 12 Co. 124; King v. Robinson, 33 Me. 114, 54 Am. Dec. 614; Lamprey v. Nudd, 29 N. H. 299; Sternbergh v. Schoolcraft, 2 Barb. 153; Wood v. Bayard, 63 Pa. St. 320; Stigers v. Brent, 50 Md. 214, 38 Am. Rep. 317; Brittain v. Mull, 99 N. Car. 483, 6 S. E. Rep. 332; Foster v. Jones, 23 Ga. 168; Newell v. Smith, 23 Ga. 170; Walker v. Clay, 21 Ala. 307; Ewing v. Wilson, 63 Tex. 88; Johnson v. Pomeroy, 81 Ohio St. 247; Dickerson v. Davis, 111 Ind. 433, 13 N.

E. Rep. 145; Maloney v. Dewey (Ill.), 19 N. E. Rep. 848; Heard v. Sack, 81 Mo. 610; Sacramento Bank v. Spencer, 53 Cal. 737.

¹⁰⁷ Allison v. Taylor, 6 Dana, 87, 33 Am. Dec. 68.

¹⁰⁸ Lamprey v. Nudd, 29 N. H. 299.

¹⁰⁹ Dickerson v. Davis, 111 Ind. 433, 13 N. E. Rep. 145.

¹¹⁰ Clark v. Dunham, 4 Denio, 263; Sternbergh v. Schoolcraft, 2 Barb. 153; Robertson v. Lain, 19 Wend. 650.

inquire into the merits of the judgment, and would not enjoin it on account of the defendant's lunacy, but only because its execution should appear to be against conscience and inequitable. If the fact of lunacy appeared anywhere in the record, we are much inclined to think that it would be within the province of an appellate court to reverse the judgment on error.

§ 206. Joint Defendants at Common Law.

At common law, if several defendants were joined in an action *ex contractu*, and all were brought before the court by service or appearance, it was absolutely essential to the plaintiff's recovery that he should establish a joint liability; in other words, he must recover against all or none; it was not competent to enter a judgment in favor of one defendant and against another.¹¹¹ And this rule still obtains in many of the states which have not departed widely from the common law practice. The rule, however, is subject to one important exception. Though the obligation in suit is joint, or joint and several, yet if one defendant pleads matter which goes to his personal discharge, such as bankruptcy, or to his personal disability to contract, such as infancy, or any other matter which does not go to the nature of the writ, or pleads or gives in evidence matter which is a bar to the action as against himself only, and of which the others could not take advantage, judgment may be rendered for such defendant against the rest.¹¹² "That rule was always adopted," says the court in Massachusetts, "with this exception,—that when one defendant pleaded in his discharge some matter personal to himself, as a discharge under a bankrupt act or insolvent law, and upon such plea had a verdict, the other defendants were still liable. The reason of the distinction is obvious, and it is this; that such a special personal

¹¹¹ Metropolitan, etc., Co. v. Morris, 39 Vt. 393; Platner v. Johnson, 3 Hill, 476; Barker v. Ayers, 5 Md. 203; Rohr v. Davis, 9 Leigh, 30; Park v. Edge, 43 Ala. 631; Helm v. Van Vleet, 1 Blackf. 342, 12 Am. Dec. 243; People v. Organ, 27 Ill. 27, 79 Am. Dec. 391; Griffith v. Furry, 30 Ill. 251, 33 Am. Dec. 186;

Flake v. Carson, 33 Ill. 518; Goodale v. Cooper, 6 Ill. App. 81; Rupe v. New Mexico Lumber Ass'n (N. Mex.), 5 Pac. Rep. 730.

¹¹² Snyder v. Snyder, 9 W. Va. 415; Coe v. Hamilton, 1 Morris (Iowa), 319; Robinson v. Brown, 32 Ill. 279.

defense does not falsify the averment of an original joint promise, but, admitting it, avoids it by the averment of matter subsequent."¹¹³ But, supposing the exception not to arise in the particular case, so strictly was the rule enforced that not even the most conclusive proof or unqualified admission of the liability of one defendant would entitle the plaintiff to a verdict against him alone.¹¹⁴ It has been held, however, that the rule has no proper application to an action against administrators as such.¹¹⁵ And it should be observed that the rule applies only where all the defendants are brought before the court or named as parties in the writ. A judgment against one of several makers of a note, without process against the others, releases those who are not sued.¹¹⁶ And in some of the states, in derogation of the common law rule, a distinction is taken between joint contracts and such as are joint and several, the courts holding that in an action upon the latter species of obligation the plaintiff may enter a *nol. pros.* against one of the defendants and proceed to judgment against the others.¹¹⁷ Under the main rule here considered it is plainly erroneous to render a final judgment against a part of several defendants while the cause remains undisposed of as to the others.¹¹⁸ Hence if one of the defendants suffers a default, and an interlocutory judgment is entered up against him, it cannot be made final until the case is finally concluded as to the other defendants; and even then, if they should succeed in maintaining a defense which went to the whole right of action, the verdict in their favor will enure to the benefit of the defaulted party, and judgment must be given for him, equally with the rest, notwithstanding the default.¹¹⁹ And in a case in Texas, where the court declined to enter judgment against one defendant, and contin-

¹¹³ *Hathaway v. Crocker*, 7 Met. 262.

¹¹⁴ *Barker v. Ayers*, 5 Md. 202.

¹¹⁵ *Gray v. White*, 5 Ala. 490.

¹¹⁶ *Mitchell v. Brewster*, 28 Ill. 163; *Bell v. State*, 7 Blackf. 83.

¹¹⁷ *Peyton v. Scott*, 2 How. (Miss.) 870. Where all the defendants are brought into court, judgment rendered by agreement against one is tanta-

mount to a dismissal as to the others. *Henry v. Gibson*, 55 Mo. 570.

¹¹⁸ *Davidson v. Bond*, 12 Ill. 84; *Barbour v. White*, 37 Ill. 164; *Prewitt v. Caruthers*, 7 How. (Miss.) 804.

¹¹⁹ *Taylor v. Beck*, 8 Rand. 316; *Rohr v. Davis*, 9 Leigh, 80; *Woodward v. Newhall*, 1 Pick. 500; *supra*, § 82.

ned the case as to him, this was held to make the judgment entered against the other defendant void.¹²⁰

§ 207. In Actions of Tort.

The rule stated in the preceding section must be restricted in its application to actions *ex contractu*; it does not govern in the case of actions *ex delicto*. In a suit founded upon tort, against several defendants, the plaintiff may recover against as many and only such defendants as he proves to be guilty, and any defendant, as against whom the proof fails, is entitled to a verdict.¹²¹ In Maryland, in an action of this kind, if, at the conclusion of the plaintiff's case, there is no evidence against one of the defendants, he is considered entitled to be acquitted; and this practice is necessary, as the court observes, for otherwise the plaintiff could deprive the defendant of material and competent witnesses by joining them as parties to the action.¹²² So if a verdict is returned against all the defendants sued jointly in tort, but in respect to one of the defendants it is not sustained by the evidence, it will be set aside, as against that defendant, upon his proper application, and the judgment be permitted to stand as against the party proven guilty of the injury complained of.¹²³

§ 208. Joint Debtor Acts.

In many of the states, the common law rule in respect to the recovery in actions against several defendants has been changed by statutes. These statutes—commonly called “joint debtor acts”—provide that judgment may be given “for or against one or more of several plaintiffs, and for or against one or more of several defend-

¹²⁰ *Wooters v. Kauffman*, 67 Tex. 488, 8 S. W. Rep. 465.

¹²¹ *Winslow v. Newlan*, 45 Ill. 145; *Harris v. Preston*, 10 Ark. 201; *Jansen v. Varnum*, 89 Ill. 100. A judgment against a portion of the defendants in actions *ex delicto* amounts to a dismissal

of the cause as against the other defendants. *Davis v. Taylor*, 41 Ill. 405.

¹²² *Hambleton v. McGee*, 19 Md. 43.

¹²³ *Hayden v. Woods*, 16 Nebr. 306, 30 N. W. Rep. 845. See also *Cauthorn v. King*, 8 Oreg. 138.

ants," and usually contain a further provision that "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."¹²⁴ Under these statutes, if a plaintiff commences an action against two or more defendants upon a joint obligation, he is no longer compelled to establish a joint cause of action against all, but a judgment may be taken against the party or parties shown to be liable, when the others are not liable.¹²⁵ Thus, when two defendants are sued jointly on a contract which, on its face, is the joint contract of both, but which in legal effect was at all times the contract of one only, a judgment may be rendered against the party liable and in favor of the other.¹²⁶ So where several persons are sued as partners on a note signed by one, and the evidence shows that there was no partnership, judgment may be rendered against the one who signed, and a nonsuit may be ordered as to the others.¹²⁷ Or a plaintiff, suing several as partners for a breach of a contract, may recover against such as he can prove to be parties to the contract, without proof of the partnership.¹²⁸ And where an action is brought against two or more upon a joint contract, an equitable defense peculiar to one defendant being set up by him, the court may give judgment for the plaintiff against the other defendants, and for the one defendant against the plaintiff.¹²⁹ And a recovery may be had against one defendant alone, in a proper case, notwithstanding another of the debtors has been released by the plaintiff upon a compromise.¹³⁰ And it is held that a statute of the character above described is a provision as applicable to suits by attachment as to

¹²⁴ Code Civil Proc. Cal. §§ 578, 579; Code of N. Y. § 274; Code of Wis. § 184; Code Civil Proc. Ohio, § 371; Code of Iowa, § 1815; Wagn. Mo. Stat. p. 1019, § 32; Code of Ark. §§ 4701, 4704.

¹²⁵ *Ah Lep v. Gong Choy*, 13 Oreg. 205, 9 Pac. Rep. 493; *Lampkin v. Chilson*, 10 Ohio St. 450; *Hunt v. Standart*, 15 Ind. 33; *Eyre v. Cook*, 9 Iowa, 185; *Stimson v. Van Pelt*, 66 Barb. 151; *Longstreet v. Rea*, 52 Ala. 195; *Murray*

v. Ebright, 50 Ind. 362; *Stafford v. Nutt*, 51 Ind. 535; *Richardson v. Jones*, 53 Ind. 240.

¹²⁶ *Clafin v. Butterby*, 5 Duer, 327.

¹²⁷ *Stoddart v. Van Dyke*, 12 Cal. 437; *Willis v. Morrison*, 44 Tex. 37; *Fielden v. Lahens*, 2 Abb. App. Dec. 111.

¹²⁸ *Crews v. Lackland*, 67 Mo. 619.

¹²⁹ *Barker v. Cocks*, 50 N. Y. 639.

¹³⁰ *Moss v. Jerome*, 10 Bosw. 220.

suits in any other form; and hence, where an attachment is sued out against two persons jointly, it may be sustained as against the separate property of one alone.¹²¹ It is a further consequence of acts of this nature, that where the verdict is in favor of a part of the defendants and against the others, the judgment thereon, if entered against "the defendants" generally, will not be erroneous; for the judgment will be construed with reference to the verdict, and will be held to be against only those defendants against whom the verdict was given.¹²² Under that clause of the joint debtor acts which provides that the court may render judgment against one of the defendants, leaving the action to proceed as to the others, whenever a several judgment would be proper, the cases hold that the true test, as to whether a separate judgment may be had, is whether a separate action could have been maintained.¹²³

§ 209. One Defendant suffering Default.

In an action of contract against several defendants, if one of them suffers default, and another, under the general issue, sets up and maintains a defense which negatives the plaintiff's right to recover against either of the defendants and shows that he had no cause of action, the plaintiff will not be entitled to judgment against the one who was defaulted, but on the contrary the successful defense will enure to the latter's benefit, and judgment must be rendered for both the defendants.¹²⁴ So if one defendant interposes an objection by way of demurrer, going to the plaintiff's right to recover, and not merely a personal matter of discharge, which is sustained, and judgment rendered on it in his favor, it will enure to the benefit of his co-defendant.¹²⁵ On the other hand, if one of the defendants makes default

¹²¹ *Allen v. Clayton*, 11 Fed. Rep. 73.

¹²² *Lamar v. Williams*, 39 Miss. 342.

¹²³ *Van Ness v. Carkins*, 12 Wis. 186.
See *Parke v. Meyer*, 28 Ark. 281.

¹²⁴ *Bowman v. Noyes*, 12 N. H. 302;
Adderton v. Collier, 32 Mo. 507 (citing
2 *Tidd's Prac.* 986; *Biggs v. Bengert*, 2
Ld. Raym. 1373; *Porter v. Harris*, 1

Lev. 63); *State v. Gibson*, 21 Ark. 140.
Rich v. Husson, 4 Sandf. 115; *Miller v.*
Longacre, 26 Ohio St. 291; *Champlin v.*
Tilley, 8 Day. 303; *Campbell v. Mc-*
Harg, 9 Iowa. 354. Compare *Storm*
Lake v. Iowa Falls, etc., R. Co., 62 Io-
wa, 218, 17 N. W. Rep. 489.

¹²⁵ *State v. Williams*, 17 Ark. 371.

and the other goes to trial, the effect is to suspend the judgment against the defaulting defendant until the result of the trial is ascertained, and if the plaintiff obtains a verdict, he is then entitled to a joint judgment against all the defendants.¹³⁶ Nor is there any necessity, in such a case, of having previously taken an interlocutory judgment by default against the party failing to answer.¹³⁷ Where, in a joint action *ex contractu* against two defendants, one of them is defaulted, and the other appears, and separate judgments are rendered against both of them, if the defendant who appeared enters a review, the effect is to vacate the judgment as to both defendants and to carry the whole case to the next succeeding term, notwithstanding a separate judgment may have been entered on the record against the defendant who was defaulted.¹³⁸

§ 210. Judgment, when Several, when Joint.

In general, where an action is brought upon a joint contract or obligation against several defendants who plead and defend jointly, the judgment must be joint, and it is error to render several judgments against them for several damages.¹³⁹ But where, for example in an action against partners on a partnership obligation, separate judgments are entered against each of the defendants, instead of a joint judgment against all, this is considered merely an irregularity, which may be corrected on motion within the statutory time.¹⁴⁰ But where there are several defendants, and the items of damages are distinct, a joint judgment cannot be entered unless each defendant is liable to the full extent of the verdict.¹⁴¹ And where the action is upon a joint and several contract, a several judgment would be proper, as the defendants might have been sued alone in such case; hence a judgment may be rendered against one or more without waiting the final trial.¹⁴² So where, of two defendants, one is liable

¹³⁶ Fletcher v. Blair, 20 Vt. 124.

¹³⁷ Peters v. Crittenden, 8 Tex. 131.

¹³⁸ Downer v. Dana, 22 Vt. 22.

¹³⁹ Holmes v. Gay, 6 Bush (Ky.), 47;
Rochester v. Anderson, 1 Bibb, 439;
Starry v. Johnson, 32 Ind. 438; Howell
v. Barrett, 3 Gilm. 433.

¹⁴⁰ Judd Linseed Oil Co. v. Hubbell,
76 N. Y. 543.

¹⁴¹ Chambers v. Upton, 34 Fed. Rep.
473.

¹⁴² Sears v. McGrew, 10 Oreg. 43. See
Croasdell v. Tallant, 33 Pa. St. 193.

individually, and the other in his representative character, the judgment against them should be several.¹⁴³ And in an action to subject assets descended to several heirs to a debt of their ancestor, the judgment, if for the plaintiff, should be several against each of the heirs for the amount received by him from the ancestor, not to exceed, however, the amount to which the plaintiff is entitled.¹⁴⁴ But although a judgment be rendered against two parties jointly, yet it must be remarked that the judgment itself is a joint and several obligation, and consequently an action can be maintained upon it against either of the judgment-debtors separately, and it can in like manner be used as a set-off against either.¹⁴⁵

§ 211. Joint Judgment as an Entirety.

There are numerous expressions in the books to the effect that a judgment is an entirety, and that if it is rendered against several defendants jointly, it is not susceptible of division or apportionment, so as to be purged of the error or irregularity it may contain as to one of them, while standing good against the rest. Accordingly it is held in a number of the states, that if the judgment is void as against one defendant, for want of jurisdiction over him, it must be considered as void as to *all* the defendants, and therefore a mere nullity.¹⁴⁶ This question might arise, for example, in a case where two persons were named as defendants, but only one was served with process, the other being a non-resident or not found, and where after a contest by the defendant served, judgment should be rendered against

¹⁴³Gray v. McDowell, 5 T. B. Monr. 501.

¹⁴⁴Ransdell v. Threlkeld, 4 Bush. 847.

¹⁴⁵Read v. Jeffreys, 16 Kans. 534. And see Stout v. Baker, 32 Kans. 113, 4 Pac. Rep. 141.

¹⁴⁶Shuford v. Cain, 1 Abb. U. S. 302; Hall v. Williams, 6 Pick. 232, 17 Am. Dec. 356; Richards v. Walton, 12 Johns. 434; Holbrook v. Murray, 5 Wend. 161; Rangely v. Webster, 11 N. H. 299; Knapp v. Abell, 10 Allen, 485; Buffum v. Ramsdell, 55 Me. 252, 92 Am. Dec.

539; Dickerson v. Chrisman, 28 Mo. 134; Hulme v. Jones, 6 Tex. 242, 55 Am. Dec. 774; Long v. Garnett, 45 Tex. 400; Thomas v. Loury, 60 Ill. 512; Brockman v. McDonald, 16 Ill. 112; Williams v. Chalfant, 32 Ill. 218; Van Rensselaer v. Whiting, 12 Mich. 449; Hughes v. Lindsey, 10 Ark. 555; Smith v. Rollins, 25 Mo. 408; Winslow v. Lombard, 57 Me. 356; Burt v. Stevens, 22 N. H. 229; Donnelly v. Graham, 77 Pa. St. 274; City of St. Louis v. Gleason, 15 Mo. App. 25.

both. According, then, to the foregoing rule, the judgment could have no more effect against the defendant who was served than against the other. Hence, to carry the supposition a step further, if the judgment were made the basis of an action, whether in a domestic or foreign tribunal, against the defendant served, he might show the irregularity of the proceedings in respect of his co-defendant, and that would be sufficient to defeat a recovery against himself. The result seems scarcely consonant to reason and justice. Yet some of the decisions, arguing from the entirety of the judgment, have felt obliged to hold precisely that position.¹⁴⁷ But there are many other authorities which hold that although a judgment may be void as against one of the defendants, for lack of jurisdiction, still it may be valid and binding upon the others, or at most voidable, but not void *in toto*.¹⁴⁸ And if this view is adopted, it is evident that the judgment will be attended by its usual incidents, as against the defendant over whom jurisdiction attached, until it is regularly reversed or vacated. Until that time an action will lie upon the judgment against him, and he will not be permitted to attack it collaterally. There are other grounds on which the judgment may be void as to one of several defendants, such as legal disability or his previous decease. But the same principle is understood to govern these cases also, and there exists the same diversity of opinion in regard to them. Some of the cases hold that if a joint judgment is void as to one defendant, because that defendant was a slave, an infant, a married woman, or was dead before its rendition, it is void as to all; or, if an incapacity of that kind is conceived as rendering the judgment voidable only as

¹⁴⁷ *Hanley v. Donoghue*, 59 Md. 239, 48 Am. Rep. 534; *Holbrook v. Murray*, 5 Wend. 161.

¹⁴⁸ *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769; *Douglass v. Massie*, 16 Ohio, 271, 47 Am. Dec. 375; *Ash v. McCabe*, 21 Ohio St. 181; *Jamieson v. Pomeroy*, 9 Pa. St. 230; *Shallcross v. Smith*, 81 Pa. St. 132; *Kitchens v. Hutchins*, 44 Ga. 620; *Green v. Beals*, 2 Caines, 254; *Crane v. French*, 1 Wend. 811; *Brittin v. Wilder*, 6 Hill, 242; *St. John v. Holmes*, 20 Wend. 609, 32 Am.

Dec. 603; *York Bank's Appeal*, 36 Pa. St. 460; *North v. Mudge*, 13 Iowa, 498, 81 Am. Dec. 441; *Winchester v. Beardin*, 10 Humph. 247, 51 Am. Dec. 702; *Collins v. Knight*, 3 Tenn. Ch. 183; *Mercer v. James*, 6 Nebr. 406; *Remington v. Cummings*, 5 Wis. 138; *Bailey v. McGinness*, 67 Mo. 362; *Cheek v. Pugh*, 19 Ark. 574; *Murphy v. Orr*, 32 Ill. 489; *Valentine v. Cooley*, Meigs, 618, 33 Am. Dec. 166; *Crank v. Flowers*, 4 Heisk. 629; *Smith v. Tupper*, 4 Sm. & Mar. 261; 43 Am. Dec. 483.

against the person affected, these cases hold it to be equally voidable as against the co-defendants.¹⁴⁰ But other decisions take the ground that a judgment rendered jointly against a married woman (for instance) and others who are *sui juris* is not, as to the latter, void and collaterally assailable, although as to the married woman it is a nullity, and although, also, it is an entirety for the purposes of review on appeal or error, and would be reversed as to all the defendants if thus directly assailed.¹⁴¹ When we inquire as to the proper disposition to be made of a joint judgment against several defendants, which is void as to one of them, when it is brought before a court of review by writ of error or appeal, we find the authorities more nearly harmonious. In general, they agree that it cannot be affirmed as to one defendant and reversed as to another, but must be reversed as an entirety.¹⁴² And conversely, if in favor of the defendants, invalidity as to one will vitiate it as to all. "The judgment, being joint in favor of all the defendants and erroneous as to one, will have to be reversed as to all. A judgment jointly entered in favor of several defendants, whether in an action upon contract or for tort, cannot be affirmed as to one and reversed as to another. Such a judgment is an entirety, and must stand or fall together."¹⁴³ The acceptance of this rule, however, is not quite universal. It is said to have no application under the statutes and system of practice in Nevada.¹⁴⁴ And in California, if one of several defendants appeals from a judgment which is erroneous as to him, on account of insufficient service, the court will not reverse the judgment as to the other defendants, but will only reverse it as against the appellant.¹⁴⁵ In Virginia it is

¹⁴⁰ *Stenhouse v. Bonum*, 12 Rich. 620; *Tedlie v. Dill*, 8 Ga. 104; *Randalls v. Wilson*, 24 Mo. 76.

¹⁴¹ *Holton v. Towner*, 81 Mo. 360; *Shallcross v. Smith*, 81 Pa. St. 182.

¹⁴² *Seargeant v. French*, 10 N. H. 444; *Sheldon v. Quinlon*, 5 Hill. 441; *Hickman v. Branson*, 1 Houst. 429; *Murphy v. O'Relley*, 78 Ky. 268; *Draper v. State*, 1 Head, 262; *Ellison v. State*, 8 Ala. 273; *Wood v. Smith*, 11 Tex. 367; *Dickson v. Burke*, 28 Tex. 117; *Frazier v. Williams*, 24 Ohio St. 625; *Cavender v.*

Smith, 5 Iowa, 157; *Fuller v. Robb*, 26 Ill. 246; *Kimball v. Tanner*, 63 Ill. 519; *Covenant Mut. Life Ins. Co. v. Clover*, 36 Mo. 392; *Powers v. Irish*, 23 Mich. 429.

¹⁴³ *McDonald v. Wilkie*, 18 Ill. 22, 54 Am. Dec. 423, citing *Harman v. Brotherson*, 1 Denio, 537; *Cruikshank v. Gardner*, 2 Hill, 838; *Sheldon v. Quinlon*, 5 Hill, 441; *Gaylord v. Payne*, 4 Conn. 190; *Bac. Abr.*, tit. *Error*, M.

¹⁴⁴ *Wood v. Olney*, 7 Nevada, 109.

¹⁴⁵ *Ricketson v. Richardson*, 26 Cal.

held that although at common law a joint judgment which is erroneous as to one defendant must be reversed as to all, yet if the alleged judgment against one is not merely erroneous but absolutely *void* and a mere nullity, this rule does not apply.¹⁵⁵ Before leaving the subject, it is necessary to remark that if the judgment is *several* as to the parties, there may well be cases in which it will be good as to one though invalid as against another, and in which an appellate court would reverse it in part and affirm it in part.¹⁵⁶ Further, the rule that a judgment void as to one defendant is void as to all is considered to apply only to judgments at law and not to decrees in equity.¹⁵⁷

It will be obvious from the foregoing review of the authorities that the cases on this topic cannot be reconciled. But it will also appear that some of the courts holding the entire invalidity of a joint judgment, which is void as to one defendant, have been forced to an extreme length in the matter by the highly technical conception of such a judgment as an ideal entirety. Sound legal reason appears to suggest that while such a judgment is undoubtedly erroneous and liable to be reversed on appeal, yet, while unreversed, it ought not to be open to impeachment, by the debtor as to whom no irregularity exists, in any collateral proceeding. It also seems consonant to justice that judgments of this character should not be vacated or set aside on the application of the party legally bound, because, presumably, it is the other only who has been deprived of his rights or injured by an irregular or erroneous practice. As to the former, the judgment should not be shorn of its usual consequences, and there seems to be no adequate reason why it should not constitute a good cause of action against him. Finally, it is too much to say that the judgment supposed would be absolutely *void* as to both or all the defendants. For a void judgment is a mere nullity and binds no one, and no one can acquire any rights under it; whereas many of the cases (even those which use the expression "void" in applica-

149. And see *Saffold v. Navarro*, 15 Tex. 76.

¹⁵⁵ *Gray v. Stuart*, 83 Gratt. 851.

¹⁵⁶ *Powers v. Irish*, 23 Mich. 429, 438;

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Buffum v. Ramsdell, 55 Me. 252, 93 Am. Dec. 589.

¹⁵⁷ *Voorhis v. Gamble*, 6 Mo. App. 1;

Dickerson v. Chrisman, 28 Mo. 134.

tion to such judgments) hold that a purchaser under such a judgment will be protected, that the record may be amended, that such a judgment merges the cause of action, that execution may be directed against one defendant and restrained as to the other, and so on, none of which consequences could transpire if the judgment were merely null and void.

§ 212. Confession of Judgment by Joint Defendants.

A judgment cannot be confessed by one of several joint debtors so as to bind those not joining in the confession.¹⁵⁸ But a more difficult question arises in regard to the validity of a judgment by confession entered upon a warrant or statement signed by a part only of those who are named in the judgment. Clearly it is nugatory as to any defendant not signing. But will it stand, notwithstanding this, as a good and valid judgment against those who did sign or execute the authority? Some of the decisions answer this question in the affirmative.¹⁵⁹ And their position seems to be supported by sound reason and justice. In California, however, on the principle of the entirety of a judgment, it is held that if the warrant authorizes the entry of judgment against a certain number, no judgment can be entered against a less number, and it will be void as to all.¹⁶⁰

§ 213. Misnomer of Parties.

It is a well established rule that if process in an action is served upon the person really intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or, after appearing, omits to plead the misnomer in abatement, and judgment is taken against him, he is concluded thereby, and in all future litigation he may be connected with the suit or judgment by proper averments.¹⁶¹ "The point of the objection to the judgment of the

¹⁵⁸ *Tripp v. Saunders*, 59 How. Pr. 379.

¹⁵⁹ *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441; *Mercer v. James*, 6 Nebr. 406; *York Bank's Appeal*, 38 Pa. St. 458; *Knox v. Bank*, 57 Ill. 330.

¹⁶⁰ *Chapin v. Thompson*, 20 Cal. 681.

¹⁶¹ *Oakley v. Giles*, 3 East, 168; *Insurance Co. v. French*, 18 How. 409; *Smith v. Bowker*, 1 Mass. 76; *Fitzgerald v. Salentine*, 10 Met. 436; *Nat. Bank*

lower court is, that the defendant having been sued and served with process by a wrong name, the court acquired no jurisdiction of him, and could render no valid judgment against him. The objection gives the name quite too much importance. A name is a means of identity, but the change of the name or the application of a wrong name does not change the thing identified. It is not the name that is sued but the person to whom it is applied. Process served on a man by a wrong name is as really served on him as if it had been served on him by his right name, and if in such case he fails to appear, or, appearing, fails to object that he is sued by the wrong name, and the judgment be rendered against him by such name, he is as much bound by the judgment as if it had been rendered against him by his right name."¹⁸² Exactly the same rule applies in the case of a corporation; though sued by a wrong name, it is bound, if duly served.¹⁸³ But it is essential to the plaintiff's recovery that it should be proved, not only that the real person was sued, but that he was duly served with process though under a mistaken name.¹⁸⁴ In a case where the complaint was against "— Doyle" and others, and a summons was issued but there was no evidence that it was served, and John Doyle answered, and judgment was rendered against James Doyle, it was held to be void, because the party against whom it was given did not appear to be a party to the suit.¹⁸⁵ A misnomer in a judgment will also be cured, in a proper case, by the principle of *idem sonans*. Thus, where a bill is filed to set aside a decree on the ground that the complainants were sued by a wrong name and therefore were not before the court, if the names given are *idem sonantes*, the bill will be dismissed.¹⁸⁶ So where a judgment is rendered and execution

v. Jagers, 31 Md. 88; Waldrop v. Leonard, 22 S. Car. 118; Bloomfield R. Co. v. Burriss, 82 Ind. 88; Parry v. Woodson, 33 Mo. 347, 84 Am. Dec. 51; Welch v. Kirkpatrick, 80 Cal. 202; Sutter v. Cox, 6 Cal. 415; Guinard v. Heysinger, 15 Ill. 288.

¹⁸² Parry v. Woodson, 33 Mo. 347, 84 Am. Dec. 51. But a judgment against "John Doe" in a suit wherein the defendant answered by his true name, and

the record of the judgment was not amended by inserting it, is void as against that defendant. McKinlay v. Tuttle, 42 Cal. 571.

¹⁸³ Hoffield v. Board of Education, 33 Kans. 644, 7 Pac. Rep. 216.

¹⁸⁴ Fitzgerald v. Salentine, 10 Met. 436.

¹⁸⁵ Ford v. Doyle, 37 Cal. 346.

¹⁸⁶ Robertson v. Winchester, 85 Tenn. 171, 1 S. W. Rep. 781.

issued against "Rosina Coons," it is not sufficient reason for setting aside a sale of real estate made on such execution that the right name of the defendant is shown to be "Rosina Kuhn."¹⁶⁷ It may also happen that the process will contain a misnomer of the plaintiff. And some of the cases, having a regard to the defendant's right to be fully informed as to the person whose demand he is required to answer, have held that if the process misnames the plaintiff it does not give sufficient notice of the suit to the defendant, the court acquires no jurisdiction, and a judgment against the defendant by default is null and void. It was so ruled in a case where one Cunningham, plaintiff in the action, was described as "Cunnington."¹⁶⁸ But the better reason is with the cases which hold that service of process in favor of the right party by a wrong name is good, and a judgment in favor of the right party by his proper name will after trial cure a misnomer in the complaint, the summons, or the other proceedings.¹⁶⁹ So a judgment and execution in the name of the treasurer of a town-ship, instead of the trustees as directed by law, cannot be held void, but voidable only.¹⁷⁰ The omission of the initial letter of the middle name of a defendant, in the entry and docketing of a judgment recovered against him, does not render it invalid or prevent its becoming a lien upon his real estate as against subsequent purchasers from him in good faith. As observed by Daniels, J.: "It was enough that one Christian name was properly added to the surname of the defendant, for in legal proceedings the law recognizes but one Christian name, and where a party is sued by that alone, the proceedings taken may regularly be continued to judgment in that name, and the fact that he may have one or more other names between his first Christian name and his surname will in no way affect their validity. This is an old and well established rule of the common law that has in no manner been changed, either by legislation or the rulings of

¹⁶⁷ Kuhn v. Kilmer, 16 Nebr. 699, 21 N. W. Rep. 448.

¹⁶⁸ *Ex parte* Cheatham, 1 Engl. 581, 44 Am. Dec. 535.

¹⁶⁹ Kronski v. Missouri Pacific R. Co., 77 Mo. 363; McGaughey v. Woods, 106 Ind. 380, 7 N. E. Rep. 7.

¹⁷⁰ Hart's Lessee v. Johnson, 6 Ohio, 87. Where a petition was brought in behalf of J. and three other plaintiffs, a judgment thereon in behalf of J. "and Co.," was held not void by reason of the apparent discrepancy. Ellis v. Jones, 51 Mo. 180.

the courts, in this state." ¹⁷¹ So there is no material variance where a judgment is entered in favor of "Laura Wilcox, guardian of W. L. Wilcox," when the correct name of the infant is W. B. Wilcox.¹⁷²

§ 214. Descriptio Personæ.

The fact that a descriptive word or phrase is added to a party's name in a judgment neither affects the validity of the judgment nor changes the legal rights and relations which it engenders. Thus the addition of the word "executor" to a defendant's name in a decree, without more, does not prevent the decree from binding his own property; the addition is mere surplusage.¹⁷³ So a judgment against "D., treasurer," is a personal judgment, the word "treasurer" being merely *descriptio personæ*.¹⁷⁴

¹⁷¹ Clute v. Emmerich, 26 Hun, 10.

¹⁷² Crawford v. Wilcox, 68 Tex. 109, 3 S. W. Rep. 695; Hicks v. Riley (Ga.), 9 S. E. Rep. 771.

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¹⁷³ Tinsley v. Lee, 51 Ga. 492; Hall v. Craige, 68 N. Car. 805.

¹⁷⁴ Dougherty v. McManus, 36 Iowa, 657.

CHAPTER XII.

THE VALIDITY OF JUDGMENTS AS DEPENDENT UPON JURISDICTION.

- § 215. Jurisdiction defined.
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- 243. Loss of Jurisdiction.
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§ 215. Jurisdiction defined.

Etymologically the word "jurisdiction" signifies the power or duty of "declaring right," that is, of declaring, in the official character of a judge, what is the law applicable to a given state of facts,

or what are the respective rights of parties, as determined by the application of law to the facts before the tribunal. The precise definition of the term, however, is rendered difficult by the complexity of the elements which enter into this power, and many of the explanations found in the books are partial or one-sided according as they lay the greater stress upon one or the other of the constituents of jurisdiction. The supreme court of Ohio has declared that "the power to hear and determine a cause is jurisdiction, and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal, to answer the charge therein contained."¹ Now this definition is open to exception in several respects. In the first place, the first clause is too restrictive. As has been justly said, "it is in truth the power to do both or either; to hear without determining, or to determine without hearing."² But even this does not go far enough. For jurisdiction is not merely the authority to determine a controversy, but also the power to announce the sentence of the law, and to announce it in such a manner that the legal rights of the parties shall be changed or modified and that new relations shall spring into existence. And further, it sometimes includes the power to command or forbid particular action or to award a particular remedy, as in cases of *mandamus*, injunction, or specific performance. In other words, jurisdiction is the power to set in operation the sanctions of the law. Again, while the preferring of a complaint or petition is the usual and regular mode of bringing a controversy to the cognizance of a court, it would be incorrect to make the jurisdiction depend upon the technicality or sufficiency in law of the case so presented. It is undoubtedly a principle of natural justice and of the law of the

¹Sheldon v. Newton, 3 Ohio St. 494. Pet. 709; Rhode Island v. Massachusetts, 12 Pet. 718.

²Ex parte Bennett, 44 Cal. 84.

land that a person who is proceeded against in a court of law should have a full and fair opportunity to make his defense. But if he is denied this right, it seems to be rather an irregularity or failure of justice, on the part of the tribunal, than a fatal defect in its jurisdiction. If the defendant is duly served with process and so brought into court, that confers jurisdiction over him, and it is not affected by any subsequent illegal or arbitrary dealing with his rights. Nevertheless the supreme federal court has held³ that an opportunity to the defendant to be heard is an essential element of jurisdiction—a decision which perhaps can be sustained on the theory that the court, by the denial of such opportunity, revokes its process and puts the defendant again out of court, but which otherwise appears to put an undue strain upon the meaning of the word.

We should therefore define jurisdiction as follows: It is the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a *res*) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient. If this definition appears complicated, it is because of the necessity of grouping three very different elements. For jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject-matter, and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit, upon a plaintiff who has not invoked its arbitrament, or upon a defendant who has never been notified of the proceeding. It cannot adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended

³ Windsor v. McVeigh, 93 U. S. 277.

to submit for its determination. These several elements of jurisdiction will be taken up and considered in their order.

§ 216. Sources of Jurisdiction.

Since the administration of justice is a part of the business of government, and since judicial tribunals are the agencies devised for effecting this purpose, their jurisdiction must ultimately depend upon their institution by the sovereignty of the particular state or country. Hence the validity of their judgments may sometimes require to be tested on public or political grounds. We have elsewhere seen that the courts of a *de facto* government, or the *de facto* courts of a lawful government, are generally recognized as having jurisdiction.⁴ But jurisdiction cannot be predicated of any voluntary or self-constituted tribunal, lacking the color of governmental authority. Its proceedings must at least appear to be had under the authority and sanction of the sovereign.⁵ But supposing a legally constituted court, we are told that "by jurisdiction over the 'subject-matter' is meant the nature of the cause of action or relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers or in the authority specially conferred. Jurisdiction of the 'person' is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the '*res*' is obtained by seizure under the process of the court, whereby it is held to abide such order as the court may make concerning it."⁶ By way of supplement to the above description we may add that the jurisdiction of a particular court, in respect to the matters of which it may take cognizance, may be defined in the constitutional or statutory enactment which creates it, or may be left to be inferred from the general nature of the court or the absence of specific limitations upon its powers, or may be enlarged or abridged by subsequent legislation. But where the constitution establishes a particular court and fixes its jurisdiction, it is not competent for the legislature to pass any stat-

⁴ *Supra*, § 178.

⁵ *Rogers v. Wood*, 2 B. & Ad. 245.

⁶ *Cooper v. Reynolds*, 10 Wall. 316;
Fithian v. Monks, 43 Mo. 515.

ute abolishing the court, or either enlarging or abridging its jurisdiction.⁷ And conversely if the constitution organizes a court and confers powers upon it, it does not require the aid of legislation to enable it to exercise those powers.⁸ But if the alleged jurisdiction of a court to take any particular action is derived from a statute, and that statute is shown to be unconstitutional, the proceedings of the court must be considered void; for as the stream cannot rise higher than its source, no jurisdiction can be derived from a void act.⁹ The question of the validity of a judgment, if depending on jurisdiction, must be determined by the jurisdiction of the court as existing at the time when the judgment was rendered.¹⁰

§ 217. Consent cannot confer Jurisdiction.

As jurisdiction is given by the law, the consent of the parties cannot confer the right to adjudicate upon any cause which the law has withheld from the cognizance of the particular court.¹¹ This rule may apply to cases where the territorial jurisdiction of the court is limited. Thus, under a constitutional provision that all civil suits shall be tried in the county wherein the defendant resides, a judg-

⁷ *Commonwealth v. Commissioners*, 37 Pa. St. 237; *Gibson v. Templeton*, 62 Tex. 555; *State v. Bank of East Tennessee*, 5 Sneed, 573; *Ward v. Thomas*, 2 Cold. 565; *Gibson v. Emerson*, 2 Engl. 172; *State v. Jones*, 22 Ark. 331; *Haight v. Gay*, 8 Cal. 297; *Deck v. Gherke*, 6 Cal. 666; *Zander v. Coe*, 5 Cal. 280. See 2 Story on the Const. §§ 1773-4; *Durousseau v. United States*, 6 Cranch, 307; *United States v. Moore*, 8 Cranch, 159; *Ex parte McCordle*, 7 Wall. 506; *United States v. Peters*, 5 Cranch, 115; *Ex parte Knowles*, 5 Cal. 300; *Ferris v. Coover*, 11 Cal. 175; *Greely v. Townsend*, 25 Cal. 604. Thus, where the constitutional jurisdiction of the supreme court is appellate only, the legislature cannot confer upon it original jurisdiction in any case. *Ward v. Thomas*, 2 Cold. 565; *State v. Bank*, 5 Sneed, 573. The legislature cannot confer upon courts

created by statute jurisdiction exclusive of that which the constitution gives to courts established by the constitution itself. *Montross v. State*, 61 Miss. 429. See *Eaton & Co. v. Hunt*, 20 Ind. 457.

⁸ *State v. Gleason*, 12 Fla. 190.

⁹ *Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 145; *Reed v. Wright*, 2 Greene (Iowa), 15. Compare *Arnold v. Shields*, 5 Dana, 18, 30 Am. Dec. 669.

¹⁰ *Champlin v. Bakewell*, 21 La. Ann. 353.

¹¹ *Home Ins. Co. v. Morse*, 20 Wall. 451; *Santom v. Ballard*, 133 Mass. 465; *State v. Fosdick*, 21 La. Ann. 258; *Mora v. Kuzac*, 21 La. Ann. 754; *Richardson v. Hunter*, 23 La. Ann. 255; *Fleischman v. Walker*, 91 Ill. 318; *Dicks v. Hatch*, 10 Iowa, 330; *Moore v. Ellis*, 18 Mich. 77; *Damp v. Dane*, 29 Wis. 419; *Peabody v. Thatcher*, 3 Colo. 275.

ment obtained in a county other than that of the defendant's residence, by an agreement between the plaintiff and defendant, the latter agreeing to acknowledge the jurisdiction, is considered to be void as against the rights of subsequent judgment-creditors who obtain their judgments in the manner and place prescribed by law.¹² But a more familiar application of the rule is in the case of an attempt to bring within the cognizance of the court a subject-matter of which by law it has no jurisdiction. Indeed we are told that it is only when a judge or court has no jurisdiction of the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction. In all other cases the objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed.¹³ And there is certainly good ground for doubting the applicability of the rule to the matter of jurisdiction of the person. For a defendant may cure a defective service of process, or waive the want of it, by appearing without exception. And this he appears also to do in confessing a judgment without action. So there are many cases holding that a person under legal disabilities may consent to the jurisdiction of the court, or waive an objection to it, by suffering a default, at least so far that the judgment will not be entirely void, though it may be erroneous or voidable.¹⁴ And it has even been held that a judgment in a state court against a consul of a foreign nation, taken upon default, is valid; on the ground that his not appearing and pleading to the jurisdiction of the court is a waiver of the want of jurisdiction over him.¹⁵

¹² *Georgia Railroad & Banking Co. v. Harris*, 5 Ga. 527. The same rule will apply under the act of congress of March 3, 1887, § 1, providing that "no civil suit shall be brought before either of said [federal] courts against any person . . . in any other district than

that whereof he is an inhabitant,"—consent cannot confer jurisdiction.

¹³ *Hobart v. Frost*, 5 Duer, 672.

¹⁴ *Supra*, §§ 190, 196.

¹⁵ *Hall v. Young*, 3 Pick. 80, 15 Am. Dec. 180.

§ 218. Judgment without Jurisdiction is Void.

It is a familiar and universal rule that a judgment rendered by a court having no jurisdiction, of either the parties or the subject-matter, is void and a mere nullity, and will be so held and treated whenever and wherever and for whatever purpose it is sought to be used or relied on as a valid judgment.¹⁶ The effect of a want of jurisdiction is clearly stated in an early decision of the United States supreme court in the following language: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers."¹⁷ Hence, for example, if a judgment is merely erroneous, the title acquired by a sale under it is valid and cannot be impeached collaterally; but if it is *void* for want of jurisdiction, the vendee takes no title whatever, and the sheriff's deed does not even create a cloud on the title which a court of equity can remove.¹⁸ So, although a judgment upon a note rendered by a court having no jurisdiction of the case is void, the note is still a valid security; it is not merged in the judgment.¹⁹ But in connection with this rule it is necessary to remember the legal presumptions in favor of the judgments and proceedings of courts of general jurisdiction and the rule against collateral attacks upon such judgments. The result deducible from a majority of the cases seems to be that it is only when the judg-

¹⁶ *Fisher v. Harnden*, 1 Paine, 55; *Towns v. Springer*, 9 Ga. 180; *Mobley v. Mobley*, *Id.* 247; *Beverly v. Burke*, *Id.* 440, 54 Am. Dec. 351; *Central Bank v. Gibson*, 11 Ga. 453; *Johnson v. Johnson*, 30 Ill. 215; *St. Louis & S. Coal Co. v. Sandoval Coal Co.*, 111 Ill. 32; *Swiggart v. Harber*, 4 Scam. 364, 39 Am.

Dec. 418; *Miller v. Snyder*, 6 Ind. 1; *Seely v. Reid*, 8 Greene (Iowa), 374.

¹⁷ *Elliott v. Peirsol*, 1 Pet. 328, 340, Trimble, J. See also *Latham v. Edgerton*, 9 Cow. 227.

¹⁸ *Bowers v. Chaney*, 31 Tex. 363; *Holland v. Johnson*, 30 Mo. 34.

¹⁹ *Linn v. Carson*, 32 Gratt. 170.

ment appears *upon its face* to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes. This will be shown more fully in the succeeding chapters.

It has been held that a void judgment may be accepted as valid by the consent of the parties, so the rights of third persons be not prejudiced. "All the parties interested may lawfully agree to confirm an invalid transcript, or nugatory judgment, provided the confirmation is to be efficacious, and give a lien, only from the time of the agreement properly appearing."²⁰ But a void judgment does not fall within the class of subjects upon which a legislature may operate retroactively by a curative or confirmatory statute. An act of the legislature undertaking to validate a judgment of a court which was void for want of jurisdiction, would be an attempted exercise of judicial power by the legislature, since, the proceedings in court having been void, it would be the statute alone which should constitute an adjudication upon the rights of the parties; and it would also be objectionable as contravening the constitutional provision which secures to every man the enjoyment of his property except as the same may be taken from him by "due process of law," for this last phrase includes the attaching of jurisdiction, due notice, and an opportunity to be heard.²¹ So when property has been attempted to be taken by a judicial proceeding which is void for want of jurisdiction, the legislature, for similar reasons, cannot validate it.²² But if the judgment is merely defective, erroneous, or irregular, in consequence of the non-observance of some formality which the legislature might have dispensed with in advance, but is not objectionable on jurisdictional grounds, then it may be confirmed or validated by a retroactive statute.²³

²⁰ Ramsey v. Linn, 2 Rawle, 229.

²¹ Richards v. Rote, 68 Pa. St. 248; Lane v. Nelson, 79 Pa. St. 407; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Griffin v. Cunningham, 20 Gratt. 109; McDaniel v. Correll, 19 Ill. 226; Den-

ny v. Mattoon, 2 Allen, 361; Israel v. Arthur, 7 Colo. 5.

²² Richards v. Rote, 68 Pa. St. 248.

²³ Lane v. Nelson, 79 Pa. St. 407; State v. Union, 83 N. J. Law, 350; Cooley, Const. Lim. 107; Black, Const. Prohib. § 209.

§ 219. Judgment against One not a Party.

A judgment rendered against one who was not made a party to the suit, or who does not appear from the record to have been proceeded against in the action or to have had his day in court, cannot be regarded as in any sense a valid judgment.²⁴ So a judgment against a defendant named in the writ, but not made a party, is merely void.²⁵ A judgment cannot pass against a person who is not mentioned in the proceedings and who has not joined issue or made himself a party; and a mere citation served on such person does not compel his appearance or justify a judgment by default.²⁶ Thus, in a suit on the bond given by the defendant in an attachment, to obtain a return of the property attached, it appeared that the judgment in the original action was rendered against the sureties in the bond, who were not parties, as well as against the attachment-defendant; and it was held that the judgment was a mere nullity as to the sureties, although it was not void as to the defendant.²⁷

§ 220. Notice to Defendant.

It is an unquestioned principle of natural justice that a man should have notice of any legal proceeding that may be taken against him, and a full and fair opportunity to make his defense. The law never acts by stealth; it condemns no one unheard. It is true that in proceedings *in rem* the notice may be constructive only, but here the action is directed against the thing itself, and there is no attempt to fasten a personal liability upon the parties concerned.²⁸ It is true also that constructive service of process is authorized in some other cases, but not for the purpose of a personal judgment. A personal

²⁴ *Ford v. Doyle*, 87 Cal. 846; *Overstreet v. Davis*, 24 Miss. 898; *Moseley v. Cocke*, 7 Leigh, 225.

²⁵ *Armstrong v. Harshaw*, 1 Dev. 187.

²⁶ *Bracey v. Calderwood*, 86 La. Ann. 796.

²⁷ *Cheek v. Pugh*, 19 Ark. 574.

²⁸ A late case holds that notice and an opportunity to be heard are essential to

the jurisdiction of all courts, even in proceedings *in rem*. *Dorr v. Rohr*, 82 Va. 359. Where a suit was commenced by attachment, but no property was attached or garnished, and there was no personal service on the defendant, *held*, that a judgment recovered in such suit was a nullity. *Judah v. Stephenson*, 10 Iowa, 493.

judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction and is utterly and entirely void.²⁹ "We think it may be regarded as settled, that a judgment of any court, in a suit requiring ordinary adversary proceedings, that appears upon its face or may be shown by evidence (in a case where it may be shown) to have been rendered without jurisdiction having been acquired, by notice, of the person of the defendant, or without jurisdiction of the subject-matter, is void, and may be treated as being so when it comes in question collaterally."³⁰ Nor is this rule confined to judgments at law. A decree in chancery against a defendant who was never served with process and did not appear, is void and may be set aside although not appealed from.³¹ And if the court has not acquired jurisdiction of the person of the defendant, as in the case that no sufficient process has been served upon him, no judgment, even of abatement, can be rendered against the plaintiff; for the defendant must become a party before the court before he can have a judgment.³²

§ 221. Statutes dispensing with Citation.

It may be made a question whether the legislature of a state can entirely dispense with notice or citation to the defendant in an action.

²⁹ Hollingsworth v. Barbour, 4 Pet. 466; Philadelphia, etc., R. Co. v. Trimble, 10 Wall. 367; Windsor v. McVeigh, 93 U. S. 277; Pennoyer v. Neff, 95 U. S. 727; St. Clair v. Cox, 106 U. S. 353, 1 Sup. Ct. Rep. 354; Freeman v. Alderson, 119 U. S. 188, 7 Sup. Ct. Rep. 165; Elliot v. McCormick, 144 Mass. 11; Steen v. Steen, 25 Miss. 518; Smith v. State, 18 Sm. & Mar. 140; Enos v. Smith, 7 Sm. & Mar. 85; Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 178; Madden v. Fielding, 19 La. Ann. 505; Wilson v. Johnson, 80 Tex. 499; Capehart v. Cunningham, 12 W. Va. 750; Hawley v. Heyman, 28 La. Ann. 347; Roberts v. Stowers, 7 Bush, 295; North v. Moore, 8 Kans. 143; *Ex parte* Woods, 3 Ark. 532; Anderson v. Miller, 4 Blackf.

417; Smith v. Myers, 5 Blackf. 223; Wort v. Finley, 8 Blackf. 335; Anderson v. Hawhe, 115 Ill. 33, 3 N. E. Rep. 566; Anderson v. Brown, 9 Mo. 646; Tyler v. Peatt, 30 Mich. 63.

³⁰ Horner v. State Bank, 1 Ind. 130, 49 Am. Dec. 855, citing Bliss v. Willson, 4 Blackf. 169; Smith v. Myers, 5 Blackf. 223; Wort v. Finley, 8 Blackf. 335; Bloom v. Burdick, 1 Hill, 130; Buchanan v. Rucker, 9 East, 192; Shaefer v. Gates, 2 B. Mon. 453; Shriver v. Lynn, 2 How. 43; Westervelt v. Lewis, 2 McLean, 511; Lincoln v. Tower, 2 McLean, 478; Hollingsworth v. Barbour, 4 Pet. 466; Campbell v. Brown, 6 How. 163; 106; Shelton v. Tiffin, 6 How. 163.

³¹ Outhwite v. Porter, 13 Mich. 533.

³² King v. Poole, 36 Barb. 243.

That this would be within its competence, is strongly intimated in an early decision of the supreme court of Georgia. "It is contended," said Lumpkin, J., "that the defendant must have notice, actual or constructive, otherwise no valid judgment could be rendered against him. We are not inclined to controvert this general rule. On the contrary we believe it to be well established by the authorities. There are several suggestions to make, however, as regards this principle. First, that it only obtains in the absence of *positive law*. The legislature may unquestionably authorize a judgment to be rendered against a party without notice. If the expression used in the statute will admit of a doubt, it will not then be presumed that a construction dispensing with notice can be agreeable to the intention of the legislature, the consequences of which are so unreasonable. But where the signification is manifest, there is no power of dispensation in the courts."²³ It may be strongly doubted, however, whether this is not ascribing an excessive power to the legislature. All our constitutions guarantee the rights and property of the individual against invasion except by "due process of law," which, according to an eminent writer, means, "in each particular case, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."²⁴ We are unable to discover any possibility of bringing a judgment, rendered without any species of notice to the defendant, within the terms of this definition. The question is different in regard to the constructive service of process. For this, as will appear hereafter, can in general only be used in a proceeding *in rem*, or one analogous to a proceeding *in rem*, and is not usually recognized as giving jurisdiction for a personal judgment, against the defendant, but only for an adjudication upon the *res* or *status* involved or for a decree which avails only against the property attached or found within the territorial jurisdiction.

²³ *Flint River Steamboat Co. v. Foster*, 5 Ga. 202, 48 Am. Dec. 248.

²⁴ *Cooley*, Const. Lim. 356. And see *Stuart v. Palmer*, 74 N. Y. 190; *Ex parte*

Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 569; *Hagar v. Reclamation Distr.*, 111 U. S. 707, 4 Sup. Ct. Rep. 663.

§ 222. Statutes regulating Mode of Citation.

"It is competent for each state to prescribe the mode of bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are, nevertheless, binding on its own citizens. For in respect to its own resident citizens, it is undoubtedly competent for the legislature to prescribe such modes of judicial proceeding as it may deem proper, to direct the manner of serving process, the notice which shall be given to defendants, and to declare the effect of a judgment rendered in pursuance of such notice."³⁵ Hence a judgment rendered in accordance with the requirements of the statute, though without actual notice to the defendant of the pendency of the suit, but upon such citation as the law authorizes (*e. g.*, leaving a copy of the summons at his last usual place of abode, though he is then out of the state), is conclusive upon the parties until set aside by some direct proceeding for that purpose.³⁶ But statutes allowing other than personal service of process must be strictly complied with to give the court jurisdiction, and it is held that this compliance must appear affirmatively in the proceedings.³⁷

§ 223. Defects in the Process.

If the defendant is to be notified of the pendency of an action against him, it is obvious that the notice must be in itself sufficient to bring him properly before the court. Jurisdiction is dependent on the form and nature of the process to the extent that it can only arise from a proper service of a notice substantially sufficient to apprise the party of everything which he is then entitled to know. If this requirement is met, although there may be a defect in the notice such as to render the subsequent judgment *irregular*, there will not be such a want of jurisdiction as to make it *void*. Mere cognizance

³⁵ *Thouvenin v. Rodrigues*, 24 Tex. 468.

³⁶ *Hurlbut v. Thomas*, 55 Conn. 181, 10 Atl. Rep. 556.

³⁷ *Zecharie v. Bowers*, 1 Sm. & Mar.

584, 40 Am. Dec. 111. A judgment rendered against lands for delinquent taxes, without the statutory notice, is invalid. *Fortman v. Ruggles*, 58 Ill. 207.

of the existence of the action is not a notice in the legal sense, upon which a valid judgment can be rendered. To be available, the notice must inform the party whose rights are to be affected of what is required of him and the consequences which may follow if he neglects to defend the action.³⁸ Hence a judgment rendered upon service of a notice which does not state the time or place at which the defendant is required to appear and defend, is void.³⁹ But where it appears that there was notice, though defective, and service, though imperfect, a decision of the court to which the process was returnable that such notice and service were sufficient, will not be held void in a collateral proceeding.⁴⁰ Thus if a judgment is obtained on unsealed process, and is afterwards revived without objection, the want of the seal does not impair the validity of the judgment.⁴¹ So where the officer's return upon mesne process is not signed.⁴² And a judgment is not invalidated by the fact of an unnecessary indorsement of the amount upon the summons.⁴³ Again, a judgment in an action in which the required number of days' notice was not given to the defendant is erroneous, but not void, and cannot be questioned in a collateral proceeding.⁴⁴ So a long summons issued by a justice's court against a non-resident of the county is not a nullity, though the statute declares that in such case the justice shall have no jurisdiction; the defendant waives the irregularity, and gives jurisdiction as to his person, if he appears and pleads to the complaint without objection to the process.⁴⁵

§ 224. Defects in the Service.

Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow

³⁸ *Peabody v. Phelps*, 9 Cal. 218.

³⁹ *Kitsmiller v. Kitchen*, 24 Iowa, 163. Acceptance of service is no waiver of defects in a summons which gave no notice of any time of appearance. *Falkner v. Guild*, 10 Wis. 568.

⁴⁰ *Shawhan v. Loffer*, 24 Iowa, 217.

⁴¹ *Heighway v. Pendleton*, 15 Ohio, 735.

⁴² *McElrath v. Butler*, 7 Ired. 396.

⁴³ *Larimer v. Clemmer*, 81 Ohio St. 499.

⁴⁴ *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527. See *Glover v. Holman*, 8 Heisk. 519; *West v. Williamson*, 1 Swan, 277. Compare *Johnson v. Baker*, 38 Ill. 98, 87 Am. Dec. 293.

⁴⁵ *Clapp v. Graves*, 26 N. Y. 418.

that the ensuing judgment will be void. For if the party would take advantage of such a matter, he must do so in the action itself by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all, that there can be said to be a want of jurisdiction. In any other case, there may be error in the subsequent proceedings, but they will be sustained against a collateral attack.⁴⁶ But a judgment recovered by default, upon service of the summons by delivery of a copy to a third person who is not a resident at the "house of defendant's usual abode," is void for want of jurisdiction.⁴⁷ And so a citation addressed to and served upon a stranger, although he is the authorized agent of the defendant, is not binding upon the latter and will not authorize a judgment against him.⁴⁸ So a judgment by default is void, when the service had upon the defendant consisted only of the handing to him by plaintiff's attorney of a copy of the declaration on the day before the original declaration was filed.⁴⁹ And the same consequences were held to result in a case where the return to the summons was made in the name of a deputy-sheriff instead of in the name of the sheriff himself.⁵⁰ And it is said that where the sheriff who serves the writ is himself the plaintiff, the judgment in the suit so begun is a nullity, and the defendant may restrain it by injunction.⁵¹

⁴⁶ *Campbell v. Hays*, 41 *Mass.* 561; *Christian v. O'Neal*, 46 *Mass.* 669. "A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case, the court acquires no jurisdiction and its judgment is void; in the other case, if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal." *Isaacs v. Price*, 2 *Dill.* 851. See *Cole v. Butler*, 43 *Me.*

401; *Hendrick v. Whittemore*, 105 *Mass.* 23.

⁴⁷ *Heffner v. Gunz*, 29 *Minn.* 108, 12 *N. W. Rep.* 842.

⁴⁸ *Waddill v. Payne*, 23 *La. Ann.* 773. In an action against a firm, the error of rendering judgment against the members, upon mere service at their place of business, is not waived by a motion for a new trial made in the firm name, but subsequently withdrawn. *Marienthal v. Amburgh*, 2 *Disney*, 586.

⁴⁹ *South Bend Plow Co. v. Manahan*, 62 *Mich.* 143, 28 *N. W. Rep.* 768.

⁵⁰ *Rowley v. Howard*, 23 *Cal.* 401.

⁵¹ *Knott v. Jarboe*, 1 *Met. (Ky.)* 504.

§ 225. Appearance as a Waiver of Citation.

A defendant who voluntarily enters a general appearance in an action thereby cures a want of citation, or waives any objections which he may have to defects or irregularities in the notice, process, or service, so that the court acquires full jurisdiction over his person.⁵² "While it is true that a judgment without personal service has no extra-territorial force, it is equally true that an appearance, either in person or by attorney, has the same force and effect as personal service, and a judgment rendered against a party who appears by attorney would have the same validity in any state of the Union as where it was rendered."⁵³ And it is held that a defendant who voluntarily appears and answers, although the answer in terms reserves the right to object to the jurisdiction of the court, is precluded thereby from objecting that the court has not acquired jurisdiction of his person; for a voluntary appearance is equivalent to personal service of the summons.⁵⁴ But it is necessary that he should actually enter an appearance to the action or do some act equivalent thereto. A recital in the record, by the clerk, at the time of rendering judgment, that the defendant had appeared at a previous term, is not sufficient evidence of an appearance to warrant a judgment as by default.⁵⁵ And a general entry that the parties appeared means only that those who were served appeared.⁵⁶ It is also to be remarked that, in order to have this effect, the appearance must be general. In the nature of things, a special appearance, entered for the sole purpose of taking advantage of defects or irregularities in the process

⁵² *Shields v. Thomas*, 18 How. 253; *Toland v. Sprague*, 12 Pet. 800; *Legee v. Thomas*, 1 Blatchf. 11; *Payne v. Farmers' Bank*, 29 Conn. 415; *Cristal v. Kelly*, 88 N. Y. 285; *Fox v. Reed*, 8 Grant (Pa.), 81; *Reynolds v. Lyon*, 20 Ga. 225; *Tipton v. Wright*, 7 Bush, 448; *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; *Miles v. Goodwin*, 85 Ill. 58; *Baker v. Kerr*, 18 Iowa, 384; *Adams Exp. Co. v. Hill*, 48 Ind. 157; *Louisville, etc., R. Co. v. Nicholson*, 60 Ind. 158;

Fulbright v. Cannefox, 30 Mo. 425; *Suydam v. Pitcher*, 4 Cal. 280; *Harris v. Guin*, 18 Miss. 563; *Choteau v. Rice*, 1 Minn. 192 (Gil. 166); *Anderson v. Morris*, 12 Wis. 689; *Lane v. Leech*, 44 Mich. 163.

⁵³ *Wilson v. Zeigler*, 44 Tex. 657.

⁵⁴ *Mahaney v. Penman*, 4 Duer, 603.

⁵⁵ *Kimball v. Merrick*, 20 Ark. 12.

⁵⁶ *Chester v. Miller*, 13 Cal. 558. See *Barker v. Shepard*, 42 Miss. 277.

or service, cannot be construed as a waiver of those objections.⁵⁷ So an appearance by motion to set aside a default, entered against several defendants served, is not such an appearance as will cure a want of service upon others, and it is error to render a final judgment pending such a motion.⁵⁸ But where a defendant, after appearing specially and obtaining an order setting aside the service of an original process, submits the cause for decision on a demurrer to the bill, such submission constitutes a voluntary appearance and gives the court jurisdiction of the person.⁵⁹ The defendant may also appear by his authorized attorney, and this is equally efficacious, in waiving irregularities and conferring jurisdiction, as an appearance in person. Questions may sometimes arise as to the right of an attorney to appear for the defendant, but usually such an appearance will be presumed to have been entered with authority.⁶⁰ And the record showing that complainants appeared by attorneys, it will be presumed that the attorneys had authority to appear for *all* the complainants.⁶¹ There are also cases holding that a judgment recovered against a defendant who was not served with process and had no knowledge of the suit, but for whom an attorney appeared *without* authority, cannot be attacked for want of jurisdiction in any collateral proceeding and is binding upon the defendant.⁶² We shall consider this point in a later section, in connection with the rule against the collateral impeachment of judgments.⁶³ But however it may be in regard to domestic judgments, it is very well settled that when the record comes from another state, a recital in it that the defendant appeared by attorney is conclusive of the fact of such appearance, but not that the attorney was authorized to appear, and the latter allegation may be controverted by the defendant.⁶⁴ It is scarcely necessary to add that if the court has not jurisdiction of the *subject-*

⁵⁷ *Ames v. Winsor*, 19 Pick. 207; *Allen v. Lee*, 6 Wis. 478; *Campbell v. Swasey*, 12 Ind. 70; *Nye v. Liscom*, 21 Pick. 268; *Standley v. Arnow*, 18 Fla. 361; *Michels v. Stark*, 44 Mich. 22.

⁵⁸ *Klemm v. Dewes*, 28 Ill. 317.

⁵⁹ *Lente v. Clarke*, 23 Fla. 515, 1 South. Rep. 149.

⁶⁰ *Martin v. Judd*, 60 Ill. 78; *Leslie v. Fisher*, 63 Ill. 118.

⁶¹ *Potter v. Parsons*, 14 Iowa, 286.

⁶² *Brown v. Nichols*, 42 N.Y. 26; *England v. Garner*, 90 N. Car. 197.

⁶³ *Infra*, § 272.

⁶⁴ *Infra*, vol. 2, § 908.

matter, that objection is not waived by appearing to the action. For here the rule applies that "consent cannot confer jurisdiction."

§ 226. Defendant's Right to be heard.

It has been declared by the supreme court of the United States that "a sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." In the case at bar, the trial court had caused the appearance of the defendant to be stricken out, but had nevertheless proceeded with the case and passed a judgment affecting his rights. This, in the opinion of a majority of the court, was equivalent to denying him the benefit of the citation. For jurisdiction, it was said, was the right to hear and determine, not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore there could be no exercise of jurisdiction. By the action of the court the defendant was excluded from its jurisdiction.⁴⁴ And this doctrine derives some support from the cases holding that opportunity to be heard is absolutely essential to the guarantee of "due process of law."⁴⁵ Nevertheless, for the reasons stated in the beginning of this chapter, in defining jurisdiction, we are not convinced that irregularities in the action of the court, even so gross as those mentioned, can properly be said to deprive it of all jurisdiction and make its decision a mere nullity.

§ 227. Judgments against Non-Residents.

It is a principle of law, too well settled to require the citation of authorities in its support, that the sovereignty of a state or country, for judicial as well as other purposes, extends only to its own citizens, or resident aliens, or persons temporarily within its borders, and to property within its territory, but not to absent non-residents.

⁴⁴ *Windsor v. McVeigh*, 93 U. S. 274.

⁴⁵ *Stuart v. Palmer*, 74 N. Y. 190.

In many of our states, however, there are statutes authorizing the commencement of certain classes of actions by a merely constructive service of process, and these acts apply almost exclusively to proceedings against non-residents. The validity of judgments rendered under them has been much in question before the courts, and principally in cases where a judgment so given in one state has been sought to be enforced in another. This aspect of the subject will be fully considered in the chapter on judgments of a sister state, to which the reader is referred. But there are certain divisions of the topic which must be treated in this connection. And first, a distinction must be carefully noted between the jurisdiction over the state's own citizens and that over aliens. Every sovereignty has plenary control over its own subjects, and it may authorize a judgment to be rendered against one of its citizens, upon a constructive notice only, and although he is temporarily absent from its dominions, and such a judgment must be everywhere recognized as valid and of binding force and effect.⁶⁷ This much being premised, the contrary rule may be stated, viz.: that a personal judgment (as distinguished from an adjudication upon status or an adjudication which is substantially *in rem*) rendered against a non-resident upon a species of constructive service only, in an action to which he did not appear, is limited in its effects to the state or country where rendered, and elsewhere is a mere nullity.⁶⁸ But if the non-resi-

⁶⁷ *Beard v. Beard*, 21 Ind. 321; *Douglas v. Forrest*, 4 Bing. 686; *Becquet v. McCarthy*, 2 B. & Ad. 951; *McRae v. Mattoon*, 18 Pick. 53; *Henderson v. Staniford*, 105 Mass. 504; *Orcutt v. Ranney*, 10 Cush. 183; *Welch v. Sykes*, 3 Gilm. 197; *Price v. Hickok*, 39 Vt. 292; *Spencer v. Brockway*, 1 Ohio, 259, 13 Am. Dec. 615; *Rangely v. Webster*, 11 N. H. 299; *Hinton v. Towns*, 1 Hill (S. Car.) 439; *Hunt v. Lyle*, 8 Yerg. 142; *Gilman v. Lewis*, 24 N. J. Law, 246.

⁶⁸ *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; *Buchanan v. Rucker*, 9 East, 192; *Pennoyer v. Neff*, 95 U. S. 714; *Bischoff v. Weathered*, 9 Wall. 812; *Cooper v. Reynolds*, 10 Wall. 303; *Thompson v.*

Whitman, 18 Wall. 457; *Knowles v. Gaslight Co.*, 19 Wall. 53; *D'Arcy v. Ketchum*, 11 How. 165; *Phelps v. Brewer*, 9 Cush. 390; *Newcomb v. Peck*, 17 Vt. 302; *Carleton v. Bickford*, 13 Gray, 591; *Hoffman v. Hoffman*, 46 N. Y. 30; *Zepp v. Hager*, 70 Ill. 223; *Aldrich v. Kinney*, 4 Conn. 330; *Reber v. Wright*, 68 Pa. St. 471; *Story, Conf. of Laws*, § 546. No personal judgment, in the absence of a citation or its equivalent, can be rendered so as to be obligatory against an absentee; the only good purpose which can be attained by calling an absent person in warranty, through a curator *ad hoc*, is the giving of notice, as far as practicable, to the warrantor,

dent, being within the state, is there personally served with process,⁶⁶ or if he appears in the action by a duly authorized attorney,⁶⁷ in either case the court has jurisdiction over him and the subsequent judgment is universally to be regarded as valid. And error in rendering a personal judgment on default against a defendant who is a non-resident, and had notice only by publication, is not available on behalf of a co-defendant who appeared.⁶⁸ In some of the states there are also statutory provisions that an action can be commenced and judgment rendered only in the county in which the defendant resides. And it has been held that this requisite is so jurisdictional in its character that a judgment rendered in another county is void and incapable of ratification.⁶⁹ But the better view appears to be that the defendant may waive this objection.⁷⁰

§ 228. Extra-Territorial Service of Process.

It is a recognized rule of international law that "no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals."⁷¹ And this principle is fully adopted by the American cases. "Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the

of the pendency of the action, but it does not justify the rendition of a final judgment. *Pagett v. Curtis*, 15 La. Ann. 451.

⁶⁶*Mowry v. Chase*, 100 Mass. 79; *Downer v. Shaw*, 22 N. H. 277; *Murphy v. Winter*, 18 Ga. 600.

⁶⁷*Holt v. Alloway*, 2 Blackf. 108; *Walker v. Lathrop*, 6 Iowa, 516. A court has jurisdiction to render a valid judgment against a corporation of a foreign state, whenever the corporation ap-

pears generally by attorney, or when legal service has been made upon it according to the laws of the state where the court sits. *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732.

⁷¹*Pattison v. Smith*, 98 Ind. 447.

⁶⁸*Richardson v. Hunter*, 23 La. Ann. 255; *Georgia Railroad & Banking Co. v. Harris*, 5 Ga. 537.

⁶⁹*Leach v. Kohn*, 36 Iowa, 144.

⁷⁰*Story, Confli. of Laws*, § 539.

state, and process published within it, are equally unavailing in proceedings to establish his personal liability."⁷⁶ Therefore if a summons is sent by mail to a non-resident defendant and comes to his hands, or is served upon him at his own domicile by an officer of the law, although it does actually apprise him of the suit against him, yet it has no greater or other effect than a purely constructive or fictitious service. It fails for lack of authority in the sovereignty whence it emanated. It does not bind him to appear, and no judgment can be rendered on it which will be recognized as valid beyond the limits of the state which rendered it.⁷⁶ In some of the states, however, an attempt is made to discriminate between the two species of service, and to attach a slightly higher value to actual service, though extra-territorial, than to service by published advertisement, probably in view of the fact that, by the former method, it is certain that the defendant will at least be informed of the proceedings against him. Thus in Iowa, under a statute providing that "when a judgment has been rendered against a defendant or defendants, served by publication only, and who do not appear," such defendant may appear within two years and move the court for a retrial, it is held that this provision does not apply to the case of a defendant who was personally served outside the state and did not appear in the action.⁷⁷

§ 229. Jurisdiction by Attachment of Non-Resident's Property.

Although a person may not reside in a particular state, it frequently happens that he may have property there, either real or personal.

⁷⁶ *Pennoyer v. Neff*, 95 U. S. 714, 737.

⁷⁶ *Wilson v. Graham*, 4 Wash. C. C. 58; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; *Price v. Hickok*, 39 Vt. 292; *Steel v. Smith*, 7 Watts & S. 447; *Holmes v. Holmes*, 4 Lans. 388; *Dunn v. Dunn*, 4 Paige, 425; *Lutz v. Kelly*, 47 Iowa, 807; *Ilsey v. Wilson*, 1 Dev. & B. Eq. 568; *Weil v. Lowenthal*, 10 Iowa, 575. The rule applies also as between

one of the United States and any foreign country. The judgment of a Canadian or any foreign court, upon service of its process made in Michigan, is not binding on a defendant who refused to recognize its jurisdiction, and it will not support an action in the courts of Michigan. *McEwan v. Zimmer*, 35 Mich. 765, 81 Am. Rep. 332.

⁷⁷ *McBride v. Ham*, 52 Iowa, 79, 2 N. W. Rep. 962.

And this, it is said, will give the courts of that state jurisdiction of actions against him. Accordingly, there are statutes in most of the states providing for the institution of suits against non-residents by the attachment of their property within the territory. But it must be carefully noted that the jurisdiction is in reality over the *property*, not the person. The existence of property within a state gives its courts power and authority to adjudicate upon that property and to cause it to be applied in satisfaction of the debts of its owner, wherever and wherever he may be. But if they assume to investigate the owner's duties and determine his obligations, their authority to do so is merely incidental to their jurisdiction over his property, and because such an inquiry is a necessary preliminary to a right disposition of the property, but not because they have any control over his person. Consequently, "when the person is not within the jurisdiction of the court, and his property is within its jurisdiction, a judgment against him will be effectual only as a judgment *in rem* acting upon that property."⁷⁸ Hence, also, if the defendant was beyond the jurisdiction and was only constructively notified of the action, though his property was attached within the state, there is no warrant for a personal judgment against him; and if the judgment is expressed in general language, it cannot be considered or treated as a judgment *in personam*, but only as a judgment *in rem*.⁷⁹ Further, a judgment founded upon this species of jurisdiction will have no force or effect, beyond the state where it was rendered, further than to bind the property attached and disposed of.⁸⁰ For the further elucidation of this subject we quote the following from an opinion of the supreme court of Minnesota. "Such a judgment, though in form a judgment *in personam*, is in effect only a judgment *in rem*. It is a

⁷⁸ Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 680; Molyneux v. Seymour, 30 Ga. 440, 76 Am. Dec. 662.

⁷⁹ Johnson v. Dodge, 19 Iowa, 106; Payne v. Witherspoon, 14 B. Mon. 270; Mickey v. Stratton, 5 Sawy. 475; Packard v. Matthews, 9 Gray, 311. See Brown v. Tucker, 7 Colo. 30, 1 Pac. Rep. 231.

⁸⁰ Phelps v. Holker, 1 Dall. 261; Gal-

pin v. Page, 18 Wall. 350; Cooper v. Reynolds, 10 Wall. 308; Pennoyer v. Neff, 95 U. S. 725; Pawling v. Bird, 18 Johns. 192; McDermott v. Clary, 107 Mass. 501; Arndt v. Arndt, 15 Ohio, 83; Woodruff v. Taylor, 20 Vt. 65; McVicker v. Bredy, 31 Me. 314; Williams v. Preston, 3 J. J. Mar. 600; Story, Conf. of Laws, § 549. See *infra*, vol. 2, § 904.

judgment for no other purpose than to reach the property which a non-resident may have in the state, but who is not personally served with process therein. It is confined exclusively to such property, and is of no further force when that is exhausted. Beyond this it is evidence of nothing; nor does it bind or conclude the defendant in anything. An action could not be maintained on it in any other court here or elsewhere; nor, in my opinion, would the party in whose favor it was rendered be precluded thereby from still bringing another action on the original consideration, for any balance that might be due to him after exhausting the property which was in the state at the time jurisdiction attached. To hold that a judgment thus rendered has any vitality after exhausting the only thing over which the court rendering it had jurisdiction, is violative of a principle inherent in all free governments and which constitutes an inflexible rule at common law, viz., that no one can be condemned unheard."²¹ Very important consequences follow from considering a judgment of this character as one *in rem* only. Thus it cannot be made the basis of an action of debt.²² Nor can proceedings be taken against the defendant to compel him to submit to an examination concerning his property; nor can the plaintiff have a warrant for his arrest, as prescribed by the code, on account of his refusal to apply property in satisfaction of such judgment.²³ So again, the power of a court to render a personal judgment against the mortgagor for a deficiency, in an action for the foreclosure of the mortgage, does not extend to a case where the mortgagor is a non-resident and has neither appeared in the action nor been served with process within the state. The remedy of the plaintiff in such case is limited to the foreclosure and sale of the equity of redemption in the mortgaged premises.²⁴ In a case where, after attachment of property and publication of a citation, the plaintiff filed an amended petition, setting

²¹ *Stone v. Meyers*, 9 Minn. 303 (Gil. 287), 86 Am. Dec. 104.

²² *Easterly v. Goodwin*, 35 Conn. 273, 95 Am. Dec. 237.

²³ *Bartlett v. McNeil*, 60 N. Y. 53.

²⁴ *Schwinger v. Hickok*, 53 N. Y. 280. Where a plaintiff in possession of land

obtained a judgment against a defendant, a non-resident of the state, upon service by publication only, and without his appearance in court, and afterwards the defendant in such action brought another action, as plaintiff, against the former plaintiff, as defend-

up an entirely new cause of action, on which judgment by default was rendered without any further citation being published or service had, it was held that the court acquired no jurisdiction and the judgment was entirely void.⁸⁵ But after an appearance and plea by the defendant in a suit commenced by attachment, in which there has been only constructive service by publication, the suit becomes one in *personam*, and a personal judgment may properly be rendered against him.⁸⁶ So where the non-resident defendant acknowledges service of the writ and waives the benefit of the statutes respecting absent defendants.⁸⁷

§ 230. What Property bound.

There are numerous intimations in the books (though perhaps no direct decision) to the effect that a judgment against a non-resident, founded upon constructive service and attachment of property, will be valid and enforceable, not only against the property actually seized, but also against any other property of his within the state. In other words, that any property of the defendant found within the territorial jurisdiction may be subjected to execution under the judgment, although it is not a personal obligation against him. And a case in New York holds that such a judgment is effectual against any property within the jurisdiction during the pendency of the action and which was or might have been seized under attachment therein.⁸⁸ That these views are entirely untenable will be at once apparent if we consider the real nature of such a proceeding. It was shown in the preceding section to be substantially a proceeding *in rem*. But in a proceeding *in rem* jurisdiction is acquired only by seizure of the

ant, in the courts of another state, *held*, that in the trial of such subsequent action, the judgment in the first action was conclusive of the rights of said parties to the land in dispute. *Venable v. Dutch*, 37 Kans. 515, 15 Pac. Rep. 520.

⁸⁵ *Stuart v. Anderson*, 70 Tex. 588, 8 S. W. Rep. 295.

⁸⁶ *Kerr v. Swallow*, 83 Ill. 879; *Darrah v. Watson*, 86 Iowa, 116.

⁸⁷ *Richardson v. Smith*, 11 Allen, 184.

⁸⁸ *Fiske v. Anderson*, 83 Barb. 71. And in Vermont it is held that a judgment against a non-resident defendant, rendered without notice, will not be adjudged invalid as a matter of law, because the property returned as attached was of merely nominal value. *Stevens v. Fisher*, 30 Vt. 200.

res, and the judgment is enforceable only against the *res*. It is therefore contrary to fundamental principles to attempt to extend its operation against property which was *not* seized, although, being within the territorial limits of the state, it *might* have been attached. And many well considered cases are explicit in declaring that such a judgment has no other force or validity whatever than to justify the disposition made of the property which was actually attached upon mesne process in the action.⁸⁰

§ 231. Service by Publication without Attachment.

Some of the decisions hold that constructive service by publication, *without* attachment of property, will give the court such jurisdiction over a non-resident that its judgment, though not enforceable beyond the state, may be satisfied out of any property of the defendant found within the borders of the state;⁸¹ or any property which was within the state at the time the order for publication was made, and which is not removed or sold to a *bona fide* purchaser before the judgment.⁸² But this position was successfully controverted in the important and leading case of *Pennoyer v. Neff*,⁸³ and the rule established that such a judgment (except in an action for divorce, which is governed by special rules, to be considered hereafter⁸⁴) is simply and entirely void for all purposes. The correct view is so clearly and ably stated in this decision that we quote at some length from the opinion. "The want of authority," said Field, J., "of the tribunals of a state to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or

⁸⁰ *Pennoyer v. Neff*, 95 U. S. 714; *Graham v. Spencer*, 14 Fed. Rep. 603; *Eastman v. Wadleigh*, 65 Me. 251, 20 Am. Rep. 695; *Coleman's Appeal*, 75 Pa. St. 441; *Tabler v. Mitchell*, 62 Miss. 487; *Johnson v. Holley*, 27 Mo. 594.

⁸¹ *Quarl v. Abbott*, 103 Ind. 283, 1 N. E. Rep. 476, 52 Am. Rep. 662.

⁸² *Jarvis v. Barrett*, 14 Wis. 591.

⁸³ 95 U. S. 714.

⁸⁴ *Infra*, vol. 2, §§ 924-933.

some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what will occur subsequently." ⁸⁴

§ 232. Statutes authorizing Constructive Service to be strictly construed.

All exceptional methods of obtaining jurisdiction over persons, natural or artificial, not found within the state, must be confined to the cases and exercised in the way precisely indicated by the statute.⁸⁵ Hence the statutory provisions for acquiring jurisdiction of a defend-

⁸⁴Pennoyer v. Neff, 95 U. S. 714. And see Mitchell v. Gray, 18 Ind. 123; Smith v. McCutchen, 38 Mo. 415.

⁸⁵Hebel v. Amazon Ins. Co., 38 Mich. 400.

ant by publication of the summons, in the stead of a personal service, must be strictly and exactly pursued.⁹⁵ As it has been well said, "no principle is more vital to the administration of justice than that no man should be condemned in his person or property without notice and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court. This would dispense with the forms of law, prescribed by the legislature for the security of absent parties. The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill? If this cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void."⁹⁷ Thus, defendants cannot be summoned by publication unless shown to be non-residents.⁹⁸ And where, under the statute, a summons and return are necessary to give the court jurisdiction, an indorsement on the writ acknowledging service is not sufficient.⁹⁹ So a judgment following a service of summons purporting to be by publication, but which was made without affidavit and order, is

⁹⁵ *People v. Huber*, 20 Cal. 81; *Pinkney v. Pinkney*, 4 Greene (Iowa), 324; *Hodges v. Brett*, *Id.* 345; *Edrington v. Allsbrooks*, 21 Tex. 186. Thus, constructive notice by publication is allowed in divorce proceedings, but the statute authorizing it must be strictly complied with. "In obtaining constructive service in this way a strict compliance with the method pointed out by statute must be observed. While experience demonstrates that this mode of giving a court jurisdiction of the person is necessary in many instances, yet courts are jealous of abuses in the application thereof. They tolerate the omission of no material step required by the law in connection therewith. The statute, at the time these

actions for divorce were commenced, commanded the 'usual exertion on the part of the sheriff to serve the summons,' notwithstanding the proceedings by publication. Rev. St. Colo. c. 18, § 8. And it has been held by this court that in divorce suits under that practice, a return *non inventus*, before the return day of the writ, would not support a notice by publication, and left the court without authority to proceed to judgment. *Clayton v. Clayton's Heirs*, 4 Colo. 410; *Vance's Heirs v. Maroney*, *Id.* 47; *Palmer v. Cowdrey*, 2 Colo. 6." *Israel v. Arthur*, 7 Colo. 5, 1 Pac. Rep. 438.

⁹⁷ *Boswell v. Otis*, 9 How. 336, 350.

⁹⁸ *Johnson v. Patterson*, 12 Ind. 471.

⁹⁹ *Chickering v. Failes*, 26 Ill. 507.

void.¹⁰⁰ And so if the affidavit upon which the order for publication issued was substantially defective, there is no jurisdiction of the defendant.¹⁰¹ Again, a judgment which is invalid because, service being made by publication, it was not shown that a copy of the petition and notice was mailed to the defendant, or that his residence was unknown (that being required by the usual wording of the statute), cannot be cured by giving such proof afterwards.¹⁰² In case of notice by publication, the court acquires no jurisdiction until proper proof of a compliance with the statute requisitions is made to appear of record.¹⁰³ And an order of the court directing non-resident defendants to be notified by publication, will not authorize a judgment against resident defendants who have not been duly served with process.¹⁰⁴

Before leaving the subject of constructive service of process, it must be remarked that a non-resident may be brought within the jurisdiction of an appellate court by mere publication of the notice, when it appears that he was personally cited or duly appeared in the action in the trial court. This is not a real exception to the rule of jurisdiction, but is based upon the consideration that the whole controversy, from its inception in the court below to its final determination by the court above, is but one suit. "Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared and litigated the merits of the controversy."¹⁰⁵

¹⁰⁰ *People v. Mullan*, 65 Cal. 396, 4 Pac. Rep. 848. ^{Am. Dec. 117; Byram v. McDowell, 15 Lea, 581.}

¹⁰¹ *Braley v. Seaman*, 80 Cal. 610.

¹⁰² *Hodson v. Tibbetts*, 16 Iowa, 97.

¹⁰³ *Tunis v. Withrow*, 10 Iowa, 805, 77

¹⁰⁴ *Pomeroy v. Betts*, 81 Mo. 419.

¹⁰⁵ *Nations v. Johnson*, 24 How. 195.

§ 233. Joint Defendants.

By the common law, where process issued against two, on a joint cause of action, and only one appeared, the other must be outlawed before there could be any further proceedings.¹⁰⁶ And in this country, —independently of statutes,—where a suit is instituted against several defendants jointly, and one is not served with process, and the court assumes jurisdiction and proceeds to render judgment against them all, such judgment is absolutely void, so far, at least, as concerns the defendant not served.¹⁰⁷ Thus, where suit is brought against three and process issued to all, but it appears to have been served upon two only, there being no return as to the third, and none of the three answer, judgment should not be entered by default generally, without amendment, discontinuance, or some other action taken in regard to the defendant not served.¹⁰⁸ So where there are several defendants, and part are served in time and others are not, judgment cannot be entered against any at the return term, but the case must be continued.¹⁰⁹

§ 234. Joint Judgment as an Entirety.

Supposing a judgment to be entered in violation of the common law rule just stated—that is, a joint judgment where some of the defendants were not served—it becomes important to determine whether it must be regarded as void for all purposes and in respect

¹⁰⁶ *Edwards v. Carter*, 1 Strange, 478.

¹⁰⁷ *Wilbur v. Abbot*, 60 N. H. 40; *Odom v. Denny*, 16 Gray, 114; *McDoel v. Cook*, 2 N. Y. 110; *Jones v. Reed*, 1 Johns. Cas. 20; *Boaz v. Heister*, 6 Serg. & R. 18; *Vandiver v. Roberts*, 4 W. Va. 493; *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456; *Moody v. Lyles*, 44 Miss. 121; *Ayer v. Bailey*, 5 How. (Miss.) 688; *Faver v. Briggs*, 18 Ala. 478; *Houston v. Ward*, 8 Tex. 124; *Bayless v. Daniels*, 8 Tex. 140; *Johnson v. Vaughan*, 9 B. Mon. 217; *Hickey v. Smith*, 6 Ark. 456;

Dunn v. Hall, 8 Blackf. 32; *Allen v. Chadsey*, 1 Ind. 399; *Brockman v. McDonald*, 16 Ill. 112; *Swift v. Green*, 20 Ill. 178; *Treat v. McCall*, 10 Cal. 511; *Proctor v. Lewis*, 50 Mich. 329, 15 N.W. Rep. 495. In Ohio, it is said that a judgment against all of several defendants, where only a part are served with process, is erroneous but not void. *Douglass v. Massie*, 16 Ohio, 271, 47 Am. Dec. 875.

¹⁰⁸ *Rogers v. Harrison*, 44 Tex. 169.

¹⁰⁹ *Evans v. Gill*, 25 Ill. 116.

to all parties, or merely voidable as against those who were not notified. This question has been considered in a preceding section; and it was there shown that, notwithstanding a great conflict of authorities, the better opinion was that such a judgment is at most voidable as to the defendant not served, while it ought to stand as a perfectly valid adjudication against the other until reversed, but that, if carried up by appeal or writ of error, it must be reversed as to both the defendants.¹¹⁰ In case of a purely joint liability there may be justice in adhering to the stricter view; but otherwise the conception of a judgment as an entirety appears to be highly technical and ill adapted to the purposes of justice.

§ 235. Joint Judgment authorized by Statute.¹

In order to escape the rigor of the common law rule above stated, several of the states have passed statutes which provide that where an action is instituted against two or more defendants upon an alleged joint liability, and some of them are served with process, but jurisdiction is not obtained over the others, the plaintiff may still proceed to trial against those who are before the court, and if he recovers, may have judgment against all the defendants whom he shows to be jointly liable, but it must be so entered as to be enforceable only against the joint property of all and the separate property of those served.¹¹¹ But this statute must be strictly followed; the judgment must be in form against both; and a judgment against the one served alone is erroneous in substance.¹¹² Nor can the clerk, upon the application of the plaintiff, enter judgment upon default against the party served only; a judgment so entered is void.¹¹³ And if it should appear upon the trial that the contract in suit was not joint, but was made with one of the defendants only, then of course the statute does not apply, and the plaintiff should be nonsuited.¹¹⁴ Fur-

¹¹⁰ *Supra*, § 211.

¹¹¹ Code Civil Proc. Cal. § 418; Code of N. Y. § 186; Gunzberg v. Miller, 39 Mich. 80; Johnson v. Lough, 22 Minn. 208.

¹¹² Nelson v. Bostwick, 5 Hill (N. Y.),

37, 40 Am. Dec. 810; Stehr v. Olbermann, 49 N. J. Law, 688, 10 Atl. Rep. 547.

¹¹³ Kelly v. Van Austin, 17 Cal. 564.

¹¹⁴ Fleming v. Freese, 26 N. J. Law, 263.

ther, if the defendant who was not served was a non-resident of the state, and did not appear in the action, the judgment, so far as concerns him, can have no extra-territorial validity nor be enforced against him in the state of his domicile. And it is held that even in the courts of the state which rendered the judgment he would be allowed to show, in avoidance of the judgment, that he was not a joint contractor, as it is that fact alone that makes such judgment binding upon him.¹¹⁵

§ 236. Statutory Several Judgment.

In a number of the states, according to the statute law, or the practice prevailing in the courts, and in derogation of the common law, if two or more persons are sued in a joint action, the plaintiff may proceed against any one or more of them upon service of process on them, notwithstanding there may be others not served, and if his contention is successful, he may have judgment against those served, excluding the others.¹¹⁶ In Vermont, in a case where process was sued against two persons, who were declared against as joint promissors, and service was made upon one only, the other not becoming a party in court, and evidence was given showing that the person served alone made the promise declared on, it was held, under the law of that state relating to such cases, that a judgment might be recovered against the person so making the promise.¹¹⁷

§ 237. Judgment against Partners.

At the common law, where a partnership is sued, each member of the firm must be brought within the jurisdiction of the court by due

¹¹⁵ *Harker v. Brink*, 24 N. J. Law, 333.

¹¹⁶ *Ingraham v. Gildemeester*, 2 Cal. 88; *Hirschfield v. Franklin*, 6 Cal. 607; *Kelley v. Bandini*, 60 Cal. 530; *Simpson v. Prather*, 5 Oreg. 86; *Loney v. Bailey*, 43 Md. 10; *Hunt v. Anderson*, 33 Miss. 559; *Raney v. McRae*, 14 Ga. 589, 40 Am. Dec. 660; *Moore v. Estes*, 79 Ky. 282;

Caldwell v. Harp, 2 McCord, 275; *Merchants' Bank v. Evans*, 9 W. Va. 373; *Norfolk & W. R. Co. v. Shippers' Compress Co.*, 88 Va. 272, 2 S. E. Rep. 189; *Fender v. Styles*, 81 Ill. 460; *Dillon v. Porter*, 36 Minn. 341, 31 N. W. Rep. 56; *Bennett v. Townsend*, 1 Nebr. 460.

¹¹⁷ *Hodges v. Eastman*, 13 Vt. 253.

citation. Hence where an action is instituted against several persons constituting a partnership, either before or after its dissolution, and one partner is not served with process, and judgment is rendered against them all, such judgment will be voidable so far as concerns the partner who was not served.¹²⁸ On similar principles, and since one partner cannot bind his co-partner by a forthcoming bond to which he has signed the latter's name without authority, a statutory judgment on such bond is void as to the partner not signing, for want of jurisdiction.¹²⁹ In those states, however, where the "joint debtor acts" are in force, if not all the partners are served with process, still a judgment may be rendered against the firm, to be enforced against the partnership property and the individual property of the partners served.¹³⁰ But such a judgment will have no extra-territorial validity against any partner who was not served and did not appear,¹³¹ the case being governed by the same rules which apply in any other action against joint defendants. And in California it is held that, where, in an action against a partnership on a joint liability, the complaint and summons designate the defendants individually, with a description that they are partners doing business under a firm name, the judgment can only be against the parties served, and not against a defendant not served with summons or who does not appear, though he be a member of the partnership.¹³²

¹²⁸ *Hall v. Lanning*, 91 U. S. 160; *Ingraham v. Gildemeester*, 2 Cal. 88; *Schloss v. White*, 16 Cal. 68; *Inos v. Winspear*, 18 Cal. 397; *St. John v. Holmes*, 20 Wend. 609, 32 Am. Dec. 608; *Mitchell v. Greenwald*, 48 Miss. 167; *Dreser v. Wood*, 15 Kans. 344; *Harford v. Street*, 46 Iowa, 594; *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 678; *Faver v. Briggs*, 18 Ala. 478; *Anderson v. Arnette*, 27 La. Ann. 287; *Galennie v. Akin*, 17 La. 42, 36 Am. Dec. 604.

¹²⁹ *Smith v. Tupper*, 4 Sm. & Mar. 261, 43 Am. Dec. 483.

¹³⁰ *Newlon v. Heaton*, 42 Iowa, 598; *Patten v. Cunningham*, 63 Tex. 666. A

judgment to the effect that plaintiff do recover of the member served a certain sum "for which let execution issue, to be levied upon the goods and chattels of the firm and upon the individual property of the defendant served with citation," is a valid judgment against the partnership, under which the partnership property, real as well as personal, may be seized and sold. *Alexander v. Stern*, 41 Tex. 198.

¹³¹ *Hall v. Lanning*, 91 U. S. 160; *Scott v. Bogart*, 14 La. Ann. 261.

¹³² *Davidson v. Knox*, 67 Cal. 143, 7 Pac. Rep. 418.

§ 238. Appearance for Defendant not Served.

In an action upon contract against several defendants, where only a part are served with process, but others voluntarily appear, a judgment for the plaintiff must be against all the defendants appearing.¹²³ But where an attorney appears specially for one defendant in an action against two, and afterwards, as attorney for "the defendant," acknowledges judgment in favor of the plaintiff, it is a good judgment only as to the defendant for whom such attorney appeared, and a joint execution is erroneous.¹²⁴

§ 239. Construction of Judgment against "Defendants" generally.

Where process is served only on a part of the defendants named in the writ, and judgment is taken against "the defendants," without naming them, and without any appearance of those not served, the judgment will be understood to be only against those who were duly served.¹²⁵ In some of the states, the rendition of a judgment against a defendant who was not served and who did not appear is considered to be a mere clerical mistake which may be amended on motion in the trial court.¹²⁶

§ 240. Jurisdiction of the Subject-Matter.

Thus far we have been considering the questions connected with the acquisition of jurisdiction over the defendant's person. We turn now to the equally important subject of the validity of judgments as dependent upon jurisdiction of the subject-matter. And first, it is an inflexible rule that any judgment rendered by a court upon a

¹²³ Mosher v. Small, 5 Pa. St. 221; Heaton v. Collins, 7 Blackf. 414; Hall v. Law, 2 Watts & S. 121.

¹²⁴ Kimmel v. Kimmel, 5 Serg. & R. 204.

¹²⁵ Morgan v. Morgan, 2 Bibb, 888; Clark v. Finnell, 16 B. Mon. 829; Boyd

v. Baynham, 5 Humph. 836, 18 Am. Dec. 488; Winchester v. Beardin, 10 Humph. 247, 51 Am. Dec. 702; Neal v. Singleton, 26 Ark. 491. *Per contra*, Langley v. Grill, 1 Col. Ter. 71.

¹²⁶ Savage v. Walshe, 26 Ala. 619; Bergen v. Bolton, 10 Mo. 658.

matter not within its jurisdiction is null and void, incapable of ratification, and subject to collateral impeachment.¹²⁷ The principles which govern this point have been well stated in the following language: "1. Where the judicial tribunal has general jurisdiction of the subject-matter of the controversy or investigation, and the special facts which give it the right to act in a particular case are averred and not controverted, upon notice to all proper parties, jurisdiction is acquired and cannot be assailed in any collateral proceeding. 2. Where the judicial tribunal has not general jurisdiction of the subject-matter under any circumstances, no averment can supply the defect, no amount of proof can alter the case, no consent can confer jurisdiction. 3. Where the judicial tribunal has not *general* jurisdiction of the subject-matter, but may exercise it under a particular state of facts, those facts must be specially averred and established, and when so established on a hearing of all proper parties, cannot be impeached in any collateral proceeding."¹²⁸ If we inquire more particularly into the meaning of the terms here employed, the answer is, that "by jurisdiction over the subject-matter is meant the nature of the cause of action or of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."¹²⁹ Now the powers to be exercised by a court may be prescribed and defined in several different ways, though always emanating from the sovereign authority of the state. First, the constitution or statute which creates the court may specifically enumerate the classes of actions or subjects of controversy to which its jurisdiction shall extend. This is usually the case in respect to the original jurisdiction of the supreme courts, and in respect to probate and similar courts. Or else the power may be conferred in general language; as where a court of record is invested with "general original jurisdiction in all cases,

¹²⁷ *Smith v. Knowlton*, 11 N. H. 191; *Morse v. Presly*, 25 N. H. 299; *Eaton v. Badger*, 33 N. H. 228; *Reel v. Elder*, 62 Pa. St. 308; *Lyles v. Bolles*, 8 S. Car. 258; *Ponce v. Underwood*, 55 Ga. 601;

Wamsley v. Robinson, 28 La. Ann. 798; *Gilliland v. Sellar*, 2 Ohio St. 223; *Webb v. Carr*, 78 Ind. 455.

¹²⁸ *Bumstead v. Read*, 81 Barb. 669.

¹²⁹ *Cooper v. Reynolds*, 10 Wall. 308.

civil or criminal, at law or in equity," or where a separate chancery court is given general equity powers. And here no subject will be intended to be out of the jurisdiction of the court, unless clearly shown to be so by law. Or the power to hear and determine a particular class of actions or proceedings may be granted to a tribunal specially organized for that purpose or to one of the usual courts in addition to its common law powers. Or finally, the limitations of the jurisdiction may be introduced by way of exception or reservation from the general powers granted. And this may be either by withdrawing certain classes of actions from the cognizance of the court, as where a justice of the peace is forbidden to try any suit involving the title to real estate; or by fixing a money limit below which the jurisdiction shall not attach, as is the case in respect to most controversies before the circuit courts of the United States; or by designating the amount above which the jurisdiction shall terminate, as is usual in regard to justices' and other inferior courts.¹²⁰ But in every case, where jurisdiction of the subject-matter is challenged, recourse must be had to the sources of jurisdiction, whether constitution or statute, and if they show a want of authority in the court to adjudicate upon the particular controversy, its judgment must be considered incurably void. And an unconstitutional statute, it will be remembered, can have no avail as a source of jurisdiction; a judgment rendered under it is entirely without validity.¹²¹

§ 241. Sufficiency of Declaration.

In one of the early cases before the supreme court of the United States it was said, "if the petitioner states such a case in his petition that on a demurrer the court would render a judgment in his

¹²⁰ In *Jones v. Jones*, 8 Dev. 860, it was held that a judgment of a magistrate for a sum above his jurisdiction being void, no action could be maintained on it. But some other cases hold that a judgment of a court of record, founded upon a judgment of a justice of the peace which is in excess of his

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jurisdiction and consequently void, is erroneous but not void, and will stand good against collateral attacks. *Moore v. Martin*, 38 Cal. 428; *Hinds v. Wallis*, 13 Serg. & R. 213. But it is difficult to see how a nullity can be made the basis of an action.

¹²¹ *Supra*, § 216.

favor, it is an undoubted case of jurisdiction."¹²² But probably this was not meant as equivalent to saying that if the petition were demurrable there would be *no* jurisdiction. Indeed it would be impossible, on any rational theory, to make the jurisdiction depend upon the validity of the case stated by the plaintiff. For the court must pass upon the sufficiency of the declaration, and jurisdiction to proceed at least so far must be acquired by the mere filing of the pleading and service of process. But it is equally certain that a court cannot, in ordinary cases, initiate a proceeding *sua sponte*. Its jurisdiction and power remain at rest until called into activity by the application of a suitor. Jurisdiction of the subject-matter, therefore, dynamically considered, depends upon the act of the parties in invoking the aid of the law, in some regular manner, for the determination of their controversy. A court has no more power, until its action is called into exercise by some sort of pleading, to render a judgment *in favor* of a party, than it has to enter a judgment *against* him until he has been brought within its jurisdiction by some method known to the law.¹²³

§ 242. Jurisdiction of Question decided.

Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. In other words a judgment which passes upon matters entirely outside the issue raised in the record is so far invalid. "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect, within the issue.

¹²² United States v. Arredondo, 6 Pet. 709.

And see Humphries v. Bartee, 18 Miss. 283.

¹²³ Dunlap v. Southerlin, 63 Tex. 88.

That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground, that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels."¹²⁴

On this principle, where a widow brought suit for the sole purpose of having dower assigned her in her deceased husband's lands, the

¹²⁴ Munday v. Vail, 84 N. J. Law, 418. Stockton, 43 N. J. Eq. 211, 10 Atl. Rep. To the same effect see Reynolds v. 385.

heirs at law, who were infants, being made defendants, and the court not only directed an assignment of dower, but of its own accord decreed a sale of the residue of the land belonging to the heirs, it was held that, the court having exceeded its jurisdiction, the decree of sale was void and might be collaterally attacked.¹²⁶ In these cases the court lacked jurisdiction of the subject or question which it assumed to pass upon because such matter was not submitted to it by the parties. But the same result will follow if, being invested with jurisdiction for a single purpose in a special statutory proceeding, it transcends the limit and attempts to exercise its powers for other purposes also. Thus where a statute provides for an action to foreclose a mortgage against a non-resident defendant, upon publication of summons, and authorizes a decree to be made for the sale of the mortgaged premises to satisfy the debt secured thereby, the court exhausts its jurisdiction in making the decree contemplated, and if, in addition thereto, it proceeds to award a personal judgment for a sum of money against the defendant, such judgment, being beyond its power, is void.¹²⁷

§ 243. Loss of Jurisdiction.

In general, when jurisdiction has once fully attached in a cause, it will continue until the final disposition of the controversy. But this is not invariably the case, and a court may lose the jurisdiction which it has once rightfully acquired, after which it can make no further order or judgment. Such is the case when the cause has been taken up on appeal or error, and especially after the court of review has pronounced its judgment.¹²⁷ So where a pending litigation is removed from the state court to a federal court under the act of Congress in that behalf. Upon the filing of a proper petition, in a removable cause, the rightful jurisdiction of the state court ceases instantly, and every subsequent exercise of jurisdiction by it, including its judg-

¹²⁶Seamster v. Blackstock, 88 Va. 232, 28 E. Rep. 36.

¹²⁷Wood v. Stanberry, 21 Ohio St.

142; Fithian v. Monks, 48 Mo. 502; Boswell v. Dickerson, 4 McLean, 262.

¹²⁷Boynton v. Foster, 7 Met. 415.

ment if one is rendered, is erroneous, if not absolutely void.¹²⁸ The same result would follow, we apprehend, if a statute should deprive a court in which an action was pending of jurisdiction over that class of suits and transfer it to another tribunal, provided the law were explicitly made applicable to pending cases. And sometimes it may happen that jurisdiction is lost by the expiration of the term, without judgment rendered and without a proper continuance.¹²⁹

§ 244. Jurisdiction attaching, Error does not Vitiate.

In any case where the court has jurisdiction of the subject-matter of the action, and the parties are before it by due service of proper process, the jurisdiction is never ousted by the erroneous exercise of the power which it confers, and the judgment in the case, though it may be marked by error which will cause its reversal by a higher court, is not for that reason *void*.¹³⁰

¹²⁸ Dillon, Removal of Causes (5th edn.), §§ 185-6.

¹²⁹ See *supra*, §§ 179, 180. In Wisconsin, the failure of a justice to enter in his docket the *place*, as well as the time, to which a cause pending before him is adjourned, defeats his jurisdiction (unless the parties voluntarily appear

in the action subsequently) and renders all subsequent proceedings therein void. *Witt v. Henge*, 58 Wis. 244, 16 N. W. Rep. 609.

¹³⁰ *Ex parte* Bigelow, 118 U. S. 828, 5 Sup. Ct. Rep. 543; *Ex parte* Kellogg, 6 Vt. 509; *Moore v. Robison*, 6 Ohio St. 302; *Buckmaster v. Carlin*, 8 Scam. 104.

CHAPTER XIII.

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PART I. THE GENERAL RULE.**§ 245. Judgments not to be Attacked Collaterally.**

Where the court has jurisdiction of the parties and the subject-matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment, by parties or privies, in any collateral action or proceeding whatever.¹ "The

¹ Elliot v. Piersol, 1 Pet. 840; Gray v. Brignardello, 1 Wall. 627; Secrist v. Green, 8 Wall. 744; Gunn v. Plant, 94 U. S. 664; Bank of United States v. Voorhees, 1 McLean, 221; Woodman v. Smith, 87 Me. 21; Gorrill v. Whittier, 8 N. H. 265; Porter v. Gile, 47 Vt. 620; Hendrick v. Whittemore, 105 Mass. 28; Smith v. Shaw, 12 Johns. 256; People v. Downing, 4 Sandf. 189; Kean v. McKinsey, 2 Pa. St. 80; Billings v. Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Yapple v. Titus, 41 Pa. St. 195, 80 Am. Dec. 604; Wood v. Bayard, 63 Pa. St. 320; Fridge v. State, 3 Gill & J. 108, 20 Am. Dec. 468; Lancaster v. Wilson, 27 Gratt. 624; Howison v. Weeden, 77 Va.

704; Fox v. Cottage Building Ass'n, 81 Va. 677; Skinner v. Moore, 2 Dev. & B. 188, 80 Am. Dec. 153; Morris v. Gentry, 89 N. Car. 248; Bridges v. Nicholson, 20 Ga. 90; Vickery v. Scott, 20 Ga. 798; Archer v. Guill, 67 Ga. 195; Moore v. Ware, 51 Miss. 206; Insurance Co. v. De Blanc, 81 La. Ann. 100; Kent v. Brown, 38 La. Ann. 802; Sutherland v. De Leon, 1 Tex. 250, 40 Am. Dec. 100; Lee v. Kingsbury, 18 Tex. 68, 62 Am. Dec. 546; Tadlock v. Eccles, 20 Tex. 782, 73 Am. Dec. 213; Willis v. Ferguson, 46 Tex. 496; Paul v. Smith, 83 Ky. 451; Thacker v. Chambers, 5 Humph. 313, 42 Am. Dec. 431; Hall v. Heffley, 6 Humph. 444; Lewis v. Simonton, 8

doctrine of this court, and of all the courts of this country, is firmly established, that if the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void, nor can such errors be considered when the judgment is brought collaterally into question."¹ This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. "It is one," says the court in Virginia, "which has been adopted in the interest of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation and no fixed established rights. A judgment, though unreversed and irreversible, would no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up; acts of limitation would become

Humph. 185; *Bigelow v. Bigelow*, 4 Ohio, 188, 19 Am. Dec. 591; *Cochran v. Loring*, 17 Ohio, 409; *Newnam v. Cincinnati*, 18 Ohio, 838; *Sauer v. Twinning*, 81 Ind. 366; *Cody v. Hough*, 20 Ill. 43; *Kern v. Straesberger*, 71 Ill. 308; *Harris v. Lester*, 80 Ill. 307; *Wright v. Marsh*, 2 Greene (Iowa), 94; *Hampson v. Weare*, 4 Iowa, 18, 66 Am. Dec. 116; *Callahan v. Griswold*, 9 Mo. 775; *Martin v. McLean*, 49 Mo. 361; *Yeoman v. Younger*, 88 Mo. 424.

¹*McGoon v. Scales*, 9 Wall. 23, Miller, J. We subjoin some further extracts from some of the best and most satisfactory opinions on this subject:

"It may now be regarded as a legal maxim that when a judgment is offered in evidence collaterally, in another suit, its validity cannot be questioned, except for want of jurisdiction in the court that rendered it." *Paul v. Smith*, 82 Ky. 451.

"No principle of law is better settled

than that, where a court has jurisdiction of the subject-matter and of the persons of the parties, its judgment or decree, when questioned collaterally, will be held valid, and, notwithstanding the court may have proceeded irregularly, a purchaser in good faith, under its judgment or decree, will be protected." *Harris v. Lester*, 80 Ill. 307.

"It appears that the court which rendered the judgment had jurisdiction of the subject-matter involved and of the parties, in the suit in which the judgment was rendered. It is well settled that such a judgment can be impeached, between the parties thereto, only by some proper proceeding bearing directly upon the judgment itself, instituted for the purpose of having such judgment vacated and set aside. It cannot be impeached collaterally." *Porter v. Gile*, 47 Vt. 620.

"It is an essential and fundamental principle of the law that all properly

useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain; and a cloud would rest upon every title." " If the sentence last quoted seems somewhat extravagant, at least it will serve to show the substantial reasons upon which the rule rests and the inflexibility with which it is held by the courts. According to the supreme court of Massachusetts, the rule obtains "not because of an apparent authority in the court to render the judgment, but because the remedy by review or writ of error is held to be more appropriate." " This may be sufficient as a technical reason, but it cannot be doubted that the motives which have led to the establishment of the rule rather spring from the considerations of public policy, and the necessary finality of judicial decisions, indicated in the opinions previously quoted.

§ 246. To what Judgments the Rule applies.

The rule against collateral impeachment applies to every judgment, order, decree, or judicial proceeding, of whatever species, that is not absolutely void. If the judgment is *void on its face* it is of

constituted judicial proceedings must be upheld as regular, warranted by the facts and the law applicable to them, valid and effectual, until the contrary shall be shown and established by some competent proceeding for that purpose. Hence, wherever it appears on the face of the record, in any action or other judicial proceeding, that the court had jurisdiction of the parties litigant and the subject-matter in litigation, the law presumes that the court got jurisdiction in a regular or proper way, and that its orders, decrees, and judgments are valid and effectual, however irregular or fraudulent, until the irregularity and invalidity, because of fraud or other sufficient cause, shall be duly established, and such proceedings, orders, decrees, and judgments shall be declared invalid by proper decree. To allow the records of courts

of justice, their judgments and decrees, to be questioned and held to be inoperative in the same tribunal that made them, or in other tribunals, would be subversive of judicial authority and destructive of public and private justice. The law is too true to itself, and too thorough in its life and vigor, to allow of such practical absurdity; it requires that its courts shall be careful to see that their judgments settle and establish rights, and when once made must prevail everywhere. The courts making them will be slow to disturb them, and never, except for adequate cause shown in a direct proceeding for the purpose." *Morris v. Gentry*, 89 N. Car. 248.

³ *Lancaster v. Wilson*, 27 Gratt. 624, 629.

⁴ *Hendrick v. Whittemore*, 105 Mass. 23.

course a mere nullity and of no avail for any purpose, and this may be urged against it whenever it is brought in question.⁵ But otherwise, whether it be regular or irregular, correct or erroneous, valid or voidable, it is not subject to collateral attack. The rule has been held applicable to a judgment *in rem*, where the court had jurisdiction of the *res*;⁶ to a judgment condemning property in confiscation proceedings;⁷ to decrees rendered by a court of equity, when sought to be assailed in the same or another court;⁸ to a judgment in attachment;⁹ to a decree confirming an auditor's report on the distribution of the estate of an assignor for the benefit of creditors;¹⁰ to a judgment forfeiting a recognizance, that being within the competence of the court;¹¹ to an order passed by a superior court allowing a certain sum to the clerk for costs in insolvent criminal cases;¹² to an order of court approving the act of an administrator in allowing a claim against the estate;¹³ to an order granting an allowance for the support of the widow and children;¹⁴ to an order setting aside a judgment by default;¹⁵ to a decree vacating a former decree upon a petition to be let in to a defense.¹⁶ The entry of a judgment in the judgment-book, it is said, including the date of the judgment and the date of the docketing in the judgment-docket, while standing as part of the court's record, cannot be impeached collaterally.¹⁷ And while affidavits may be read or proof heard, to show that words have been improperly stricken from a judgment, they cannot be received to falsify a record by showing that an alteration, correcting it, was improperly made.¹⁸

⁵ *Supra*, § 170; *infra*, § 278.

⁶ *Otis v. The Rio Grande*, 1 Woods, 979.

⁷ *Bragg v. Lorio*, 1 Woods, 209.

⁸ *Bryan v. Kennett*, 118 U. S. 179, 5 Sup. Ct. Rep. 407; *Estep v. Watkins*, 1 Bland, 486; *Covington v. Ingram*, 64 N. Car. 123.

⁹ *Harrison v. Pender*, Busbee, 78, 57 Am. Dec. 573.

¹⁰ *Comm. v. Steacy*, 100 Pa. St. 613.

¹¹ *Rubush v. State*, 112 Ind. 107, 18 N. E. Rep. 877.

¹² *Duer v. Thweatt*, 89 Ga. 578.

¹³ *Pitner v. Flanagan*, 17 Tex. 7.

¹⁴ *Leaverton v. Leaverton*, 40 Tex. 218.

¹⁵ *Bender v. Askew*, 8 Dev. L. 150, 22 Am. Dec. 714.

¹⁶ *Southern Bank v. Humphreys*, 47 Ill. 227.

¹⁷ *Ferguson v. Kumler*, 25 Minn. 183.

¹⁸ *Walker v. Armour*, 23 Ill. 658.

§ 247. Tax Judgments.

The principle that a record cannot be impeached collaterally for mere errors or irregularities is equally applicable to a statutory judgment against land for taxes as to any other decree. "It is no objection," said the supreme court of Alabama in a recent case, "to the application of this principle that the present proceeding is to enforce the collection of delinquent taxes. While great accuracy is exacted in all such proceedings, and strict rules are applied for the protection of the tax payer, this principle forbidding the collateral assailable of judgments has often been invoked successfully in actions of this nature. It has accordingly been decided that there is no sound reason why judicial proceedings for the enforcement of taxes should be exempted from its influence."¹⁹ Thus the judgment cannot be impeached because it embraces also a personal judgment against the owner of the land beside the proper judgment against the land itself; for that part of the judgment which is directed against the owner will be regarded as mere surplusage.²⁰ The cases even go to the length of holding that it cannot be shown against such a judgment, collaterally, that the taxes on the particular tract had been in fact paid before the suit,²¹ although delinquency is the very fact upon which the jurisdiction of the court must be based. And in one state, tax judgments were sustained as valid and binding, although it was shown that the assessment on which they were based was illegal and void.²² In Illinois, however, it appears to be settled law that a judgment *by default*, in a proceeding in a county court under the statutes of that state for the condemnation and sale of real estate for taxes, is not conclusive upon the tax payer, and may be collaterally impeached.²³

¹⁹ *Driggers v. Cassady*, 71 Ala. 529; *Gunn v. Howell*, 27 Ala. 668; *Young v. Lorrain*, 11 Ill. 687; *Welshear v. Kelley*, 49 Mo. 843; *Eitel v. Foote*, 89 Cal. 439; *Branson v. Caruthers*, 49 Cal. 875; *Mayo v. Foley*, 40 Cal. 281; *Job v. Tebbetts*, 5 Gilm. 876; *Scott v. Pleasants*, 21 Ark. 864; *Cadmus v. Jackson*, 52 Pa. St. 295; *Chesnut v. Marsh*, 12 Ill. 178; *Black*,

Tax Titles, § 59; *Cooley, Taxation*, 536-580.

²⁰ *Chesnut v. Marsh*, 12 Ill. 178.

²¹ *Chauncey v. Wass*, 35 Minn. 1, 30 N. W. Rep. 826; *Cadmus v. Jackson*, 52 Pa. St. 295; *Black, Tax Titles*, § 57.

²² *Mayo v. Ah Loy*, 32 Cal. 477; *Mayo v. Foley*, 40 Cal. 281.

²³ *Gage v. Pumpelly*, 115 U. S. 454, 6 Sup. Ct. Rep. 186.

§ 248. Adjudications in Bankruptcy.

An adjudication in bankruptcy having been made by a court having jurisdiction of the subject-matter, upon the voluntary appearance of the bankrupt, and being correct in form, it is conclusive of the fact decreed and cannot be attacked collaterally in a suit brought by the assignee against a person claiming an adverse interest in property of the bankrupt.²⁴ On the same principle, a discharge in bankruptcy cannot be attacked collaterally for fraud or irregularity practiced in the proceedings in which it was obtained. "The discharge in bankruptcy pleaded by plaintiff to the defendant's set-off was a complete defense. The evidence offered by defendant, to the effect that it had no notice of the proceedings in bankruptcy, was properly excluded. The discharge read in evidence was conclusive. The regularity of the proceedings by which the discharge was procured cannot be inquired into collaterally."²⁵

§ 249. Awards.

An award of arbitrators, like a judgment at law, concludes the parties, and cannot be impeached in a collateral proceeding, even although erroneous, if it was fairly made.²⁶ If it appears to be good on its face, none of the various grounds which might be urged against its justice or legality in a direct proceeding to set it aside will avail collaterally. Thus, it was said in an early case: "An award good upon the face of it cannot be impeached but upon objections which go to the misbehavior of arbitrators. If the reception of illegal evidence appear upon the award, it may be set aside, or if a mistake of fact appear upon the face, or by confession of the referees, it should be committed; but the court cannot inquire by extrinsic testimony into the justice of the award, for that would be to try the matters in dispute *de novo*."²⁷

²⁴ Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. Rep. 799.

²⁵ Brown v. Covenant Life Ins. Co., 86 Mo. 51; Thornton v. Hogan, 68 Mo. 148;

Willey v. Pavey, 61 Ind. 457, 28 Am. Rep. 677.

²⁶ Morse v. Bishop, 55 Vt. 231.

²⁷ Jocelyn v. Donnel, Peck, 274, 14 Am. Dec. 753.

§ 250. Judgments of Inferior Courts.

We shall have occasion, in a later part of this chapter, to discuss the important distinction between superior and inferior courts, in respect to the presumptions by which the judgments of the former are sustained against collateral attacks upon their jurisdiction, and the requirement that judgments of the latter must show jurisdiction on their face. But it belongs to the present connection to advert to the well recognized rule that the judgments and decisions of an inferior court can in no case be assailed indirectly on account of errors or irregularities not affecting the jurisdiction.²⁸ Thus the regularity or legality of a judgment rendered by a justice of the peace, in a case falling within his competence and in which he had jurisdiction of the parties, so long as it is not reversed or annulled in some proper proceeding, is not open to collateral attack or impeachment.²⁹ On similar principles, an order or decree of a surrogate, or probate or orphans' court, jurisdiction having attached, is not examinable in any collateral proceeding.³⁰ Thus, in California, if a probate court acquired jurisdiction of the probate of a will, by presentation to it of a proper petition for that purpose, and the publication of notice of time of proving the will, and admitted the will to probate, that determination is final, except upon a direct proceeding by appeal,

²⁸ *Comstock v. Crawford*, 8 Wall. 396; *Grusenmeyer v. Logansport*, 76 Ind. 549; *Bell v. Raymond*, 18 Conn. 100; *Long v. Burnett*, 13 Iowa, 28; *Roosevelt v. Kellogg*, 20 Johns. 208; *Bernal v. Lynch*, 86 Cal. 135; *Thompson v. Multnomah Co.*, 2 Oreg. 34; *Shoemaker v. Brown*, 10 Kans. 383.

²⁹ *Tarbox v. Hays*, 6 Watts, 398, 31 Am. Dec. 478; *Billings v. Russell*, 23 Pa. St. 189, 62 Am. Dec. 330; *McDonald v. Simcox*, 98 Pa. St. 619; *Cumberland Co. v. Boyd* (Pa.), 4 Atl. Rep. 346; *Allen v. Martin*, 10 Wend. 300, 25 Am. Dec. 564; *Wesson v. Chamberlain*, 3 N. Y. 331; *Lightsey v. Harris*, 20 Ala. 409; *Reid v. Spoon*, 66 N. Car. 415; *Allen v. Mills*, 26 Mich. 123.

³⁰ *Welty v. Ruffner*, 9 Pa. St. 224; *Gilmore v. Rodgers*, 41 Pa. St. 120; *Leedom v. Lombaert*, 80 Pa. St. 381; *Boston v. Robbins*, 126 Mass. 384; *Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76; *Ward v. Hudspeth*, 44 Ala. 315; *Grant v. Spann*, 31 Miss. 294; *Currie v. Franklin* (Ark.), 11 S. W. Rep. 477; *Barney v. Chittenden*, 2 Greene, (Iowa), 165; *Hallock v. Moss*, 22 Cal. 266; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703. Error of judgment by a surrogate, however palpable, does not render proceedings under it void, and advantage can be taken of it only on appeal; it cannot be passed upon in a collateral suit or action. *Woodruff v. Cook*, 2 Edw. Ch. 259.

and cannot be questioned collaterally.³¹ So where the probate court has jurisdiction to order and confirm a sale of lands, the proceedings instituted for that purpose cannot be impeached collaterally.³² And a decree of partition made by a probate court, even though irregular, cannot be avoided collaterally.³³ So also the matter of appointing and removing administrators is exclusively within the jurisdiction of the probate court, and an order of that kind cannot be attacked in a collateral manner.³⁴ The rule is by no means confined to the two species of inferior courts already mentioned. It extends equally to many varieties of judicial bodies and special tribunals, all being protected, as to their judgments, in collateral inquiries, except as to jurisdiction and in some cases fraud. For example, where a court-martial has cognizance of the charges made, and has jurisdiction of the person of the accused, its sentence is valid, when questioned collaterally, although irregularities or errors are alleged to have occurred in its proceedings.³⁵ So where a board of United States Land Commissioners has once acquired jurisdiction of a matter, its subsequent proceedings therein cannot be collaterally questioned.³⁶

§ 251. Co-Ordinate Courts.

A judgment at law cannot be impeached collaterally in equity.³⁷ And conversely, the validity of a decree rendered by a court of equity cannot be impeached in a collateral action at law.³⁸ A judgment of a state court, no question as to its jurisdiction being involved, cannot be overhauled or corrected in a collateral proceeding in a Fed-

³¹*In re Warfield*, 23 Cal. 51, 88 Am. Dec. 49.

³²*Williams v. Sharp*, 3 Ind. 101; *Sturdy v. Jacoway*, 19 Ark. 499; *Tyson v. Belcher*, (N. Car.), 9 S. E. Rep. 684. Where a court of probate ordered a sale of real estate, without finding that the debts allowed exceeded the personal estate, it was *held* that though such proceeding was erroneous and would be set aside on appeal, yet as the court had jurisdiction of the subject-matter, and there was no fraud in the case, the decree was

valid until thus set aside, and could not be collaterally called in question. *Brown v. Lanman*, 1 Conn. 467.

³³*Snevely v. Wagner*, 8 Pa. St. 396; *Fowler v. Gordon*, 24 La. Ann. 270.

³⁴*Steen v. Bennett*, 24 Vt. 308.

³⁵*Keyes v. United States*, 109 U. S. 836, 3 Sup. Ct. Rep. 202.

³⁶*Bernal v. Lynch*, 86 Cal. 135.

³⁷*Redwine v. Brown*, 10 Ga. 811.

³⁸*Watson v. Williams*, 8 Ired. Eq. 232; *Alexander v. Nelson*, 42 Ala. 462.

eral court.³⁹ The courts of the United States cannot lawfully treat as nullities the judgments of the courts of the several states, rendered in suits where the latter have jurisdiction of the cause and the parties, even if they are founded upon an erroneous construction of the bankrupt act or any other statute of the United States; the remedy for the correction of the error is by a writ of error in the supreme court of the United States.⁴⁰ And it is equally clear that the reverse of this rule must hold good. That is, that the judgments and decrees of the Federal courts, in cases where their jurisdiction is not disputed, must be impervious to collateral assailment in the courts of the states, although, for example, they may proceed upon an erroneous construction of a state constitution or statute.

§ 252. What constitutes a Collateral Attack.

We are next to inquire what constitutes a collateral attempt to impeach a judgment within the meaning of the rule prohibiting such endeavors. And here we shall find that the word "collateral" is always used as the antithesis of "direct," and it is therefore wide enough to embrace any independent proceeding. To constitute a *direct* attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose.⁴¹ If an appeal is taken from a judgment, or a writ of error, or if a motion is made to vacate or set it aside on account of some alleged irregularity, the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule. Thus, whether a judgment is irregular or erroneous is not a legitimate inquiry in a suit brought for its enforcement.⁴² So in the distribution of a fund,

³⁹ *Railroad v. Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. Rep. 614, 617; *Central Trust Co. v. Seasongood*, 180 U. S. 482, 9 Sup. Ct. Rep. 575.

⁴⁰ *Kittredge v. Emerson*, 15 N. H. 227.

⁴¹ *Nichols v. Wimmer (Tex.)*, 19 Reporter, 475.

⁴² *Rogers v. Rogers*, 15 B. Mon. 364. Nor in an action on a promissory note

an auditor cannot inquire into the validity of a judgment regular on its face, although he may receive testimony to show that it has been paid or otherwise satisfied.⁴³ So, in an action of trespass to try title, a judgment ordering a sale of the premises under a mortgage, rendered in a former suit between the same parties, cannot be impeached.⁴⁴ In a suit on an appeal bond, the validity of the judgment which has been affirmed on appeal, cannot be questioned.⁴⁵ The same is true of a suit on a recognizance entered in an attachment suit; no allegations can be heard against the regularity of the judgment in attachment.⁴⁶ On the other hand, a complaint alleging that a justice's judgment is absolutely void upon its face, but that, though void, it is apparently a lien on land described in the complaint, and that the plaintiff is entitled as owner of the land to a decree annulling and avoiding such judgment, is a direct and not a collateral attack upon it.⁴⁷ And in Louisiana it is held that no improper or objectionable impeaching of a judgment collaterally is involved in a creditor intervening, in a suit brought by heirs against their mother to enforce payment for their interest in the deceased father's estate, which she has purchased, for the purpose of opposing the claims of the heirs, although their claims are founded on a probate decree confirming the sale, agreed on by the parties.⁴⁸

§ 253. Proceedings to prevent Execution of the Judgment.

When a person against whom a judgment has been taken at law applies to a court of equity for relief against the judgment,—as by

given in satisfaction of the judgment. *Mitchell v. State Bank*, 1 Scam. 526.

⁴³ *Bank's Appeal*, 85 Pa. St. 528.

⁴⁴ *Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546.

⁴⁵ *Sturgis v. Rogers*, 26 Ind. 1; *Bostic v. Love*, 16 Cal. 69.

⁴⁶ *Eimer v. Richards*, 25 Ill. 289. In an action of replevin, for goods sold by authority of an execution upon the judgment of a justice, that judgment cannot be impeached, although the plaintiff was the purchaser of the

goods and the defendant in the action of replevin. *Tarbox v. Hays*, 6 Watts, 398, 31 Am. Dec. 478.

⁴⁷ *Penrose v. McKenzie*, 116 Ind. 35, 18 N. E. Rep. 884. See *McCampbell v. Durst* (Tex.), 11 S. W. Rep. 880.

⁴⁸ *Bedell v. Hayes*, 21 La. Ann. 643. For heirs to claim the benefit of the rule that a judgment of confiscation of lands operates only during the lifetime of the owner, is not impeaching the judgment collaterally. *Slidell v. Bank*, 27 La. Ann. 354.

petition for an injunction to restrain its execution,—it might appear at first sight that such a proceeding constituted a direct attack upon the judgment. For its object is clearly to escape the consequences of the adjudication by showing adequate reasons for withholding them in the particular case. But a closer examination shows that an action of this character is in reality a collateral attack upon the judgment, and therefore cannot be based upon mere errors or irregularities. For first, if a court of equity sees fit to grant such an application, its intervention never takes the form of annulling, vacating, or opening the judgment, or in any wise interfering with its standing as a valid and binding adjudication. Its action is not direct but indirect. It lays its restraining hand upon the person not the judgment. What chancery does, in these circumstances, is to put its prohibition upon the person who has obtained the judgment, to prevent him from making a use of it which, as it appears, would be inequitable and against conscience. Secondly, it is very well settled, upon the authorities, that equity will not review judgments at law, unless for causes giving rise to the peculiar equitable jurisdiction, that is, as it is commonly phrased, “grounds of which the party could not have availed himself at law, or of which he was prevented from availing himself at law, by fraud, accident, or the act of the opposite party unmixed with negligence or fault on his own part.”¹⁰ From these considerations it will appear that an application to enjoin the collection of the judgment is strictly speaking a collateral attack upon it. And this view is fully sanctioned by the decisions. “It is a familiar doctrine,” says the court in Indiana, “that such a proceeding to enjoin the enforcement of a judgment by execution constitutes a collateral attack upon the judgment, and cannot be maintained on account of errors or irregularities merely, but only upon a showing that the judgment is void.”¹¹ The same reasoning and the same conclusion will apply to the case of a motion to quash an execution. “Where a judgment of a court which has jurisdiction of the subject-matter and of the parties is either erroneous or irregularly entered, but stands unreversed and

¹⁰ *Infra*, §§ 365, 366.

¹¹ *Krug v. Davis*, 85 Ind. 309.

unvacated, and with no attempt made to supersede, alter, or in any way reform it, it would seem clear on principle that an execution issued on it cannot be quashed on the ground of error or informality in the judgment. Such seems the doctrine of the cases when they hold that the motion to quash the execution should be grounded upon something subsequent to the judgment, and that, where the execution substantially pursues the judgment, there is no fault in the execution."²¹ But it has been declared by the supreme court of the United States that when application is made to collect judgments by process not contained in themselves,—as for example by *mandamus*,—and requiring, in order to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever."²²

§ 254. Habeas Corpus Proceedings.

The writ of *habeas corpus* is very frequently sued out to obtain the release of a person held in custody under the judgment or sentence of a court, and in a great many instances the attempt has been made to impeach such judgment on grounds going to its legality or regularity, or even upon objections to the anterior proceedings. But the courts have resolutely set their faces against this practice, refusing to look beyond the judgment itself, except in the single case where a want of jurisdiction is alleged. A proceeding of this nature is undoubtedly a collateral attack upon the judgment; and exceptional as the remedy is, and beneficent as is the purpose it subserves, there is no good reason for permitting it to be made the vehicle for objections to the judgment or sentence which could not be urged against it in any other collateral proceeding. Accordingly the authorities declare that the writ will not be issued when it appears

²¹ *Merrick v. Merrick*, 5 Mo. App. 123, citing *Swinney v. Watkins*, 22 Ga. 570; *Shorter v. Mims*, 18 Ala. 658; *Skidmore v. Bradford*, 4 Pa. St. 296.

²² *Brownsville v. Loague*, 129 U. S. 498, 9 Sup. Ct. Rep. 327.

on the face of the petition that the petitioner is detained by virtue of the final judgment of a court of competent jurisdiction;⁵³ and that such a judgment, valid on its face, is an unanswerable return to a writ of *habeas corpus*.⁵⁴ But while errors or irregularities will not be thus inquired into, the subject of jurisdiction is legitimately open to investigation, including both jurisdiction of the person and subject-matter and of the particular order or sentence assumed to be passed, as well as the *sources* of jurisdiction when founded on statute or ordinance. The several points will be discussed in detail in the next following sections.

§ 255. Errors and Irregularities not Reviewable.

If the question is upon the judgment of a court of competent jurisdiction, the petitioner in *habeas corpus* cannot impeach it on the ground of any error or irregularity in the proceedings or sentence of the court which does not go to the extent of impairing or taking away its power or jurisdiction to act in the case.⁵⁵ The reason is

⁵³ *In re Brittain*, 98 N. Car. 587. That the allowance of the writ of *habeas corpus* is not a merely ministerial act but a judicial one, see *Church on Hab. Corp.* §§ 92-94.

⁵⁴ *Smith v. Hess*, 91 Ind. 424.

⁵⁵ *Ex parte Watkins*, 8 Pet. 198; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Reed*, 100 U. S. 18; *Ex parte Parks*, 98 U. S. 18; *Ex parte Virginia*, 100 U. S. 389; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Williams*, 1 Wash. C. C. 240; *Phinney, Petitioner*, 83 Me. 440; *O'Malia v. Wentworth*, 65 Me. 129; *In re Dougherty*, 27 Vt. 825; *Walbridge v. Hall*, 8 Vt. 114; *Olmstead v. Hoyt*, 4 Day, 436; *Herrick v. Smith*, 1 Gray, 1, 61 Am. Dec. 881; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People v. McLeod*, 1 Hill, (N. Y.), 377, 37 Am. Dec. 328; *Baker's Case*, 11 How. Pr. 418; *Commonwealth v. Keeper*, 26 Pa. St. 279; *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374; *Ex parte Rollins*, 80 Va. 314; *In re Schenck*, 74 N. Car. 607; *Dover*

v. State, 75 Ala. 40; *Kirby v. State*, 63 Ala. 51; *Ex parte Simmons*, 63 Ala. 416; *Ex parte Sam*, 51 Ala. 34; *Keen v. McDonough*, 8 La. 185; *State v. Fenderson*, 28 La. Ann. 83; *Ex parte Schwartz*, 2 Tex. App. 74; *Ex parte McGill*, 6 Tex. App. 498; *Ex parte Boland*, 11 Tex. App. 159; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Patterson v. Pressley*, 70 Ind. 94; *People v. Foster*, 104 Ill. 156; *In re Truman*, 44 Mo. 181; *Ex parte Toney*, 11 Mo. 661; *Rolfs v. Shallcross*, 80 Kans. 758, 1 Pac. Rep. 523; *In re Petty*, 22 Kans. 477; *Matter of Eaton*, 27 Mich. 1; *Petition of Semler*, 41 Wis. 517; *In re Blair*, 4 Wis. 623; *Ex parte Gibson*, 31 Cal. 619; *Ex parte Hartman*, 44 Cal. 32; *Ex parte Granice*, 51 Cal. 375; *Ex parte McCullough*, 35 Cal. 96; *Ex parte Lemkuhl*, 73 Cal. 53, 13 Pac. Rep. 148; *Ex parte Farnham*, 8 Colo. 545; *Ex parte Smith*, 2 Nev. 338; *Ex parte Twohig*, 18 Nev. 302; *Rex v. Carlile*, 4 Car. & P. 415.

this. If any such erroneous or irregular action has occurred, he has his remedy by appeal, error, or *certiorari*. And although, on a review by an appellate court, the objections presented might be amply sufficient to procure a reversal of the judgment, yet he cannot make the proceeding by *habeas corpus* a short cut to the same result, because that would be twisting the extraordinary remedy away from its proper object to make it subserve an entirely different purpose. The importance of this rule justifies its illustration by a number of examples. Thus the investigation on *habeas corpus* will not be allowed so wide a range as to include the nature, weight, or sufficiency of the *evidence* on which the judgment was rendered, or the reasons on which it was based.⁶⁶ Nor can advantage be taken in this manner of a defect in the verdict, although it would be sufficient to cause the reversal of the judgment on appeal or writ of error;⁶⁷ nor of any errors made by the court in granting, modifying, or setting aside orders in criminal cases;⁶⁸ nor of any errors alleged to have been committed in the determination of questions arising on a motion in arrest of judgment, these not being jurisdictional defects, although the question determined was whether an act charged in an indictment was or was not a crime.⁶⁹ It is the same of irregularities in the proceedings. On *habeas corpus* there can be no inquiry into a defective or irregular selection of the grand jury;⁷⁰ nor whether the indictment upon which the judgment was given, being regular on its face, was ever in fact found by a grand jury.⁷¹ Neither can advantage be taken of the fact that the judgment does not specifically describe the offense of which the petitioner was convicted;⁷² nor of the fact that only one officer was present at the returning of the verdict, instead of two as required by law;⁷³ nor of the fact that the court pronounced judgment upon a

⁶⁶ *Macke v. Ryan*, 81 Kans. 54, 1 Pac. Rep. 785; *In re Gibson*, 84 Kans. 641, 9 Pac. Rep. 763; *In re Watson*, 80 Kans. 753, 1 Pac. Rep. 775; *Ex parte Jackson*, 45 Ark. 158; *Starr v. Barton*, 84 Ga. 99; *State v. Bloom*, 17 Wis. 521; *Griffin v. State*, 5 Tex. App. 457; *In re Bogart*, 2 Sawy. 396; *Ex parte Phillips*, 57 Miss. 357.

⁶⁷ *Dover v. State*, 75 Ala. 40.

⁶⁸ *Ex parte Hartman*, 44 Cal. 84.

⁶⁹ *Ex parte Parks*, 98 U. S. 18; *Ex parte Shaffenberg*, 4 Dillon, 271.

⁷⁰ *State v. Fenderson*, 28 La. Ann. 82.

⁷¹ *Ex parte Twohig*, 18 Nev. 302.

⁷² *Ex parte Gibson*, 81 Cal. 619; *Ex parte Smith*, 2 Nev. 338.

⁷³ *Rex v. Carlile*, 4 Car. & P. 415.

verdict on a charge of felony during the enforced absence of the petitioner in jail;⁶⁴ nor of the fact that the record shows affirmatively that there was no interval of time between the plea of guilty and the sentence, although the statute requires an interval of at least two days.⁶⁵

§ 256. Jurisdiction may be examined.

In order that a judgment may be valid, it is necessary that the court should have had jurisdiction both of the person and the subject-matter; the want of such jurisdiction may be shown on *habeas corpus*; and if either element is proved to be wanting, the judgment is void and an imprisonment under it is illegal.⁶⁶ But it is to be observed that in criminal cases the question of jurisdiction of the subject-matter may frequently become a fact in issue, and in that event its determination by the verdict will preclude a fresh investigation of the subject on proceedings by *habeas corpus*. This is the case where the jurisdiction of the court over the place where the alleged offense was committed is traversed by the defendant, and the jury find that the *locus in quo* is within the limits of the court's territorial jurisdiction. After such a finding, the petitioner cannot impeach the judgment by showing that the place was without such limits.⁶⁷ It must also be remarked in this connection that there is a material difference in the authorities, as to the circumstances in which a judgment may be impeached for want of jurisdiction, when it is not void on its face. This topic will be treated in the third part of the present chapter. In the mean time, we call the reader's notice to the fact that the collateral investiga-

⁶⁴ *Ex parte Farnham*, 8 Colo. 545.

⁶⁵ *Ex parte Smith*, 2 Nev. 838.

⁶⁶ *Reynolds v. Orvis*, 7 Cow. 269; *Ex parte Bridges*, 2 Woods, 428; *Cropper's Case*, 2 Rob. (Va.) 842; *Johnson v. United States*, 8 McLean, 89; *Miller v. Snyder*, 6 Ind. 1. As regards the nature and effect of a judgment void for want of jurisdiction, and the right of every court to treat such judgment as a nullity, when drawn collaterally in question, there is no substantial difference

between the case of an imprisonment under such a judgment, and one of any other illegal imprisonment under pretense of authority from the United States, in respect to the right of a state court to inquire in the first instance by *habeas corpus* into its legality. *Matter of Tarble*, 25 Wis. 390, 8 Am. Rep. 85.

⁶⁷ *In re Newton*, 16 C. B. 97; *People v. Liscomb*, 60 N. Y. 571, 19 Am. Rep. 211; *Deckard v. State*, 88 Md. 186.

tion of a judgment on *habeas corpus* is only a special application of the general rule. And if a majority of the states refuse to allow parties or privies to attack a judgment, in general, for want of jurisdiction, unless the record itself shows where the jurisdiction failed, there is nothing in the nature of this special case to take it out of the rule. A word must be added in regard to a particular class of courts whose sentences have sometimes been thought to be open to revision on *habeas corpus*, viz., courts-martial. It is now well settled that while the jurisdiction of such a court may be challenged and examined in such a proceeding, its judgment cannot be disregarded or annulled, or the prisoner discharged, unless it is absolutely void. "The question of the jurisdiction of a general court-martial may always be inquired into upon the application of any party aggrieved by its proceedings, and so may that of every other judicial tribunal; but the range and scope of the inquiry is controlled by the same rules and limitations in both cases. There must be jurisdiction to hear and to determine, and to render the particular judgment or sentence imposed. If this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally upon *habeas corpus*. It would be as indecorous and as wanton a stretch of judicial power to assume in advance that a general court-martial will erroneously convict an accused person of a military offense, as it would be to indulge such a presumption concerning a common-law court."⁶⁶ Finally, the writ of *habeas corpus* cannot be used as substitute for *quo warranto*. "One convicted by a jury and sentenced in court by a judge *de facto*, acting *colore officii*, though not *de jure*, and detained in custody in pursuance of his sentence, cannot properly be discharged on *habeas corpus*. The validity of the appointment or election of an officer *de facto*, before whom a prisoner has been convicted of crime, will not be inquired into on *habeas corpus*."⁶⁷

⁶⁶ *In re Davison*, 21 Fed. Rep. 620; *Ex parte Reed*, 100 U. S. 18; *Ex parte Kearney*, 7 Wheat. 88; *Wise v. Withers*, 8 Cranch, 831; *Dynes v. Hoover*, 20 How. 85; *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. Rep. 1050. See *People v. Warden*, 100 N. Y. 20, 2 N. E. Rep. 870.

⁶⁷ 9 Am. & Engl. Encyclo. of Law, p. 286 (a source from which I have derived much assistance in preparing these sections); *Griffin's Case*, 1 Chase Dec. 364; *State v. Bloom*, 17 Wis. 521; *People v. Stevens*, 5 Hill, 680; *Hoglan v. Carpenter*, 4 Bush, 89.

§ 257. Constitutionality of Statutes.

Applications for release on *habeas corpus* are not infrequently made on the ground that the law under which the prosecution and conviction were had was unconstitutional, and there is much conflict of authority upon the question whether an inquiry into the validity of such law is proper in a proceeding of this nature. In several of the states it is apparently the accepted rule that the constitutionality of a statute or ordinance cannot be examined on *habeas corpus*, and if no other ground is presented for the petitioner's discharge, the court will refuse to interfere.⁷⁰ It may be urged in support of this view that the trial court has always the right to pass upon the question of its own jurisdiction, and that if it assumes to act in the matter and to proceed to judgment, it necessarily affirms the validity of the statute under which its action is taken, which finding should be respected in every other court. This argument is not without weight. But on the other hand, it cannot be too strongly insisted that an unconstitutional law is no law at all. It cannot make that a crime which was not so before. It cannot confer jurisdiction. A proceeding taken under it is void, not merely erroneous. A person convicted under it is innocent, and is held in custody illegally. Hence if the validity of the law could not be tested on *habeas corpus*, we should have, supposing it to be in fact unconstitutional, a most anomalous case, viz., a person unlawfully restrained of his liberty, and that too in the most unwarrantable circumstances, whose relief is the sole object of this writ, and yet to whom relief must be denied. We are decidedly inclined to agree with the numerous cases which hold that the alleged unconstitutionality of the act or ordinance under which the petitioner is held is always a proper subject of inquiry on *habeas corpus*, and that if the court finds it to be invalid, it is justified in releasing the prisoner.⁷¹ The Federal courts uniformly hold that the imprison-

⁷⁰ *Ex parte Boenninghausen*, 91 Mo. 301, 1 S. W. Rep. 761; *Ex parte Bowler*, 16 Mo. App. 14; *Matter of Harris*, 47 Mo. 164; *Platt v. Harrison*, 6 Iowa. 79; 71 Am. Dec. 889; *Matter of Underwood*,

80 Mich. 503; *Ex parte Fisher*, 6 Nebr. 809; *Ex parte Winston*, 9 Nev. 71; *In re Callicott*, 8 Blatchf. 89; *Ex parte Booth*, 8 Wis. 145.

⁷¹ *Ex parte Siebold*, 100 U. S. 371;

ment of a person under an invalid ordinance of a municipal corporation is such a case of unlawful restraint as will justify their releasing him on *habeas corpus*, because, being without "due process of law," it is in violation of the fourteenth amendment to the constitution of the United States.⁷² But the circuit court will not overrule the solemn judgment of the supreme court of the state upon the question of the validity of such ordinance, where there is reasonable ground for doubt; in such cases the ultimate decision should be referred to the supreme court of the United States.⁷³ And there is authority to the point that the Federal courts have no jurisdiction to discharge a prisoner held under a state statute, on the ground that such statute is in violation of the constitution of the state, or in excess of the powers which the people of the state have conferred on their legislature; if it does not violate the Federal constitution, the question is for the state courts.⁷⁴

§ 258. Jurisdiction to render the Particular Sentence.

In the case of *Ex parte Shaw*,⁷⁵ the supreme court of Ohio expressed the following views. "The question presented in this case is, whether, conceding that the sentence is for horse-stealing, and that, by statute, the sentence must be for a period not less than three years, the commitment is lawful. The courts are required by statute, upon conviction, to sentence for a period not less than three years. The sentence in this case is for one year. Does this render the sentence

Ex parte Clarke, *Id.* 399; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 153; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 784; *Matter of Brosnahan*, 4 McCrary, 1, 18 Fed. Rep. 62; *In re Lee Tong*, 9 Sawy. 335, 18 Fed. Rep. 258; *Stockton Laundry Case*, 26 Fed. Rep. 611; *In re Ziebold*, 23 Fed. Rep. 791; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Whitcomb's Case*, 120 Mass. 118; *Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. Rep. 298; *Brown v. Duffus*, 66 Iowa, 198, 23 N. W. Rep. 396; *Ex parte Burnett*, 30 Ala. 461;

In re Payson, 23 Kana. 757; *Ex parte Delaney*, 43 Cal. 478; *Ex parte Rollins*, 80 Va. 314; *Ex parte Mats*, 19 Tex. App. 112.

⁷² *In re Lee Tong*, 9 Sawy. 335, 18 Fed. Rep. 258; *Stockton Laundry Case*, 26 Fed. Rep. 611; *In re Ah Jow*, 29 Fed. Rep. 181; *Laundry License Case*, 23 Fed. Rep. 705; *Ex parte Yung Jon*, 23 Fed. Rep. 308.

⁷³ *In re Wo Lee*, 9 West C. Rep. 81.

⁷⁴ *Matter of Brosnahan*, 4 McCrary, 1, 18 Fed. Rep. 62.

⁷⁵ 7 Ohio St. 81, 70 Am. Dec. 55.

void and the commitment of the relator unlawful? The question is one simply of jurisdiction. The court had jurisdiction over the offense and its punishment. It had authority to pronounce sentence; and while in the legitimate exercise of its power, committed a manifest error and mistake in the award of the number of years of the punishment. The sentence was not void, but erroneous." And accordingly the court refused to release the prisoner on *habeas corpus*. And a number of other cases agree with this doctrine.⁷⁶ But the argument is far from satisfactory. It involves the error of overlooking the fact that jurisdiction to render the particular sentence imposed is equally as essential to its validity as jurisdiction of the person or the subject-matter. If either of these three elements is wanting, the judgment is a nullity. Now in respect to the sentence, the court has precisely the jurisdiction which the statute gives it, no more and no less. And if the statute prescribes that the sentence shall be for not less than three years, the court is utterly without power to sentence for one year. This seems too plain for argument. And indeed the great preponderance of authority sustains the proposition that if the court had not jurisdiction to render the particular sentence,—if the sentence is different from that prescribed by the law, or is below the minimum or above the maximum,—that is good ground for releasing the prisoner on *habeas corpus*.⁷⁷

⁷⁶ *Ex parte* Van Hagan, 25 Ohio St. 432; *People v. Cavanagh*, 2 Abb. Pr. 89; *Ex parte* Bond, 9 S. Car. 80, 80 Am. Rep. 20; *Ex parte* Crandall, 84 Wis. 177.

⁷⁷ *Ex parte* Lange, 18 Wall. 168; *Ex parte* Milligan, 4 Wall. 181; *Ex parte* Wilson, 114 U. S. 417, 5 Sup. Ct. Rep. 935; *Ex parte* Bernert, 7 Pac. C. L. J. 460; *Ex parte* Page, 49 Mo. 291; *People v. Walters*, 15 Abb. N. Cas. 461; *People v. Liscomb*, 60 N. Y. 559; *Ex parte* Kearney, 55 Cal. 212; *In re* Petty, 23 Kans. 477; *Ex parte* Bulger, 60 Cal. 438; *Miller v. Snyder*, 6 Ind. 1; *Ex parte* Smith, 2 Nev. 388. The point is illustrated in the following clear and forcible manner, in *Ex parte* Lange, *supra*: "If a justice of the peace, having juris-

diction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would for the same reason be void. Or if, on an indictment for treason, the court should render a judgment of attainder, whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court, be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court, and by the constitution."

§ 259. Sufficiency of Process or Pleadings.

Upon proceedings by *habeas corpus*, the court from which the writ issues has no power to inquire into the sufficiency of the indictment or information on which the trial was had that resulted in the judgment under which the prisoner is detained; nor can it undertake to decide whether such pleadings state an indictable offense. And although the indictment be defective or irregular, or fail to disclose any crime known to the law, yet that is no reason for discharging the petitioner, and he must be remanded.⁷⁸ The rule rests upon the fact that such a defect is not jurisdictional. If the court has general jurisdiction of the subject-matter, and the party is properly before it, its judgment is conclusive and binding and cannot be attacked collaterally, and if error or irregularity supervenes, such as in the case supposed, it is error or irregularity in the *exercise* of the court's jurisdiction, and does not make its sentence a nullity. Further, if there is any power which a court possesses beyond question or cavil, it is the power to judge of the sufficiency of the indictment or complaint and to determine whether or not the offense charged is legally punishable. If it should come to a mistaken conclusion in regard to these matters, there would undoubtedly be *error* in the technical sense. But it must be remembered that *habeas corpus* cannot be made to discharge the functions of a writ of error or of an appeal. A view contrary to that here expressed is held by the supreme court of California.⁷⁹

§ 260. To what Parties the Rule applies.

Having fully discussed the permissibility of collaterally impeaching judgments in the special case of proceedings upon *habeas corpus*, we

⁷⁸ *Ex parte Watkins*, 3 Pet. 198; *Ex parte Parks*, 93 U. S. 20; *Petition of Semler*, 41 Wis. 517; *Davis's Case*, 123 Mass. 324; *Matter of Eaton*, 27 Mich. 1; *Emanuel v. State*, 36 Miss. 627; *Parker v. State*, 5 Tex. App. 579; *In re*

Truman, 44 Mo. 181; *Ex parte Whitaker*, 43 Ala. 323; *Ex parte Twohig*, 18 Nev. 302.

⁷⁹ *Matter of Coryell*, 22 Cal. 178; *Ex parte Kearney*, 55 Cal. 212.

now resume the consideration of the main rule. And we are next led to inquire, to what parties does this rule apply? An answer is given by the supreme court of Vermont in the following terms: "The rule that a judgment of a court of competent jurisdiction is conclusive, until reversed or in some manner set aside and annulled, and that it cannot be attacked collaterally by evidence tending to show that it was irregular or improperly obtained, only applies to parties and privies to the judgment, who may take proceedings for its reversal, and in no sense extends to strangers."⁸⁰ Or, as the rule is sometimes stated, where a party has an opportunity to apply to the court entering the judgment to open it or vacate it, he must do so, and cannot resort to a collateral attack.⁸¹ For instance, a stockholder in a corporation against which a judgment has been recovered, and out of whose estate the execution issued thereon has been satisfied, or may be satisfied, is so far a privy in law that he may bring error to reverse it; but for that very reason he cannot attack the judgment collaterally for any defect, such as an irregularity in the service of process.⁸² But it is not every stranger who may impeach a judgment in a collateral proceeding. The law does not permit wanton or unnecessary attacks upon its judgments, and they will stand as valid against any third person who fails to show that he has a real and substantial interest in avoiding the judgment, and one which the law is bound to protect. As the cases express it, the rule does not apply to such third persons or strangers to the record as would be prejudiced in regard to some pre-existing right if the judgment were given full effect.⁸³ Again, admitting that the particular individual has the right

⁸⁰ *Atkinson v. Allen*, 19 Vt. 619, 86 Am. Dec. 861; *Eureka Iron Works v. Bresnahan* (Mich.), 88 N. W. Rep. 884; *Caswell v. Caswell*, 28 Me. 232. See *Succession of Quinn*, 30 La. Ann. 947. This was the rule of the common law. A judgment may be avoided without a writ of error, by a plea, where the party is a stranger to it. *Randal's Case*, 2 Mod. 808. That is, as a stranger cannot bring error, he may attack the judgment collaterally, if adverse to his interest, as for fraud or collusion.

⁸¹ *Vose v. Morton*, 4 Cush. 37, 50 Am. Dec. 750; *Griswold v. Stewart*, 4 Cow. 457; *Davoue v. Fanning*, 4 Johns. Ch. 199.

⁸² *Came v. Brigham*, 39 Me. 35.

⁸³ *Eureka Iron Works v. Bresnahan* (Mich.), 88 N. W. Rep. 884. The validity of a judgment foreclosing a mortgage cannot be questioned by one not connected with the mortgagor's title, as grantee, mortgagee, judgment-creditor, etc. *Glass v. Gilbert*, 58 Pa. St. 206.

to allege cause against the judgment in a collateral proceeding, it must not be supposed that every possible objection is open to him for this purpose. It is stated, in *Maine*, that a stranger whose rights are affected may impeach a judgment collaterally on three grounds only, viz., that the court rendering it had no jurisdiction of the case; that the judgment was obtained by fraud or collusion; or that the judgment was irregularly or unlawfully rendered, to his prejudice.⁸⁴ But this rule,—in respect to the third ground stated,—is probably too liberal to be everywhere accepted as sound. The *Pennsylvania* courts hold that a stranger has no right to interfere with a judgment, however irregular, except where it is founded in collusion.⁸⁵ And it is said that only a defendant can avoid a judgment for irregularity (that is, by writ of error or motion to vacate), and as long as he is content to waive the irregularity, strangers cannot avail themselves of it collaterally.⁸⁶ It has been made a question how far this right is open to a garnishee, in respect to the judgment in the main proceedings. The correct view is stated in an *Illinois* decision, from which we quote as follows. "The first question arising on this record is whether a garnishee, who sues out a writ of error to reverse a judgment rendered against him, may inquire into the legality and regularity of the previous proceedings against the defendant in attachment. In one respect he unquestionably can. In a suit by attachment the court must acquire jurisdiction, and proceed to enter a judgment against the defendant, before it can pronounce any judgment against a party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. He would not be protected in the payment of a judgment obtained under such circumstances. It would be regarded as a voluntary and not a compulsory payment, and the defendant might compel him to pay a second time. It is clear therefore that a garnishee should be permitted to inquire into the validity of the previous proceedings in the case. If such proceed-

⁸⁴*Sidensparker v. Sidensparker*, 53 Me. 481, 88 Am. Dec. 527. See *Lyles v. Bolles*, 8 S. Car. 258; *Boiase v. Dickson*, 81 La. Ann. 741.

⁸⁵*Drexel's Appeal*, 6 Pa. St. 272. And see *Lowber and Wilmer's Appeal*, 8 Watts & S. 887, 42 Am. Dec. 302.

⁸⁶*Rollins v. Henry*, 78 N. Car. 842.

ings are void, the judgment against the garnishee may for that cause be reversed on error. But if the court had jurisdiction, its errors and irregularities can only be called in question by the defendant, and that, too, in a direct proceeding for the purpose. They affect him only, and he may waive or insist on them. The garnishee has no cause to complain, for he will be protected in the payment of the judgment."²⁷

PART II. FOR ERRORS AND IRREGULARITIES.

§ 261. Erroneous and Irregular Judgments.

No principle of law is more firmly settled than that the judgment of a court of competent jurisdiction, so long as it stands in full force and unreversed, cannot be impeached in any collateral proceeding on account of mere errors or irregularities, not going to the jurisdiction.²⁸ Thus defective findings, or the absence of any findings of fact in a trial by consent by the court, do not render the judgment a nullity, and it cannot be attacked collaterally therefor.²⁹ So obvious clerical errors in the judgment-roll which could not

²⁷ *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405; *Whitehead v. Henderson*, 4 Sm. & Mar. 704; *Matheney v. Galloway*, 12 Sm. & Mar. 475; *St. Louis, etc., Ins. Co. v. Cohen*, 9 Mo. 431; *Schoppenhast v. Bollman*, 21 Ind. 235.

²⁸ *Huff v. Hutchinson*, 14 How. 586; *Parker v. Kane*, 22 How. 1; *Thompson v. Tolmie*, 2 Pet. 157; *Bannister v. Higginson*, 15 Me. 78; *Davidson v. Thornton*, 7 Pa. St. 123; *Miltimore v. Miltimore*, 40 Pa. St. 151; *Clark v. Bryan*, 16 Md. 171; *Howison v. Weeden*, 77 Va. 704; *Fox v. Cottage Building Assn.*, 81 Va. 677; *State v. Conolly*, 6 Ired. 243; *Den dem. White v. Albertson*, 3 Dev. 241, 22 Am. Dec. 719; *Upson v. Horn*, 3 Strobb. 108, 49 Am. Dec. 633; *James v. Smith*, 28 Car. 183; *Mobley v. Mobley*, 9 Ga. 247; *Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 199; *Saltonstall v. Riley*, 28 Ala. 164, 65 Am. Dec. 334; *Wall v. Wall*,

28 Miss. 409; *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 100; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Driggers v. Cassady*, 71 Ala. 539; *Moore v. Tanner*, 5 T. B. Mon. 42, 27 Am. Dec. 35; *Dorsey v. Kendall*, 8 Bush. 294; *Derr v. Wilson*, 84 Ky. 14; *Sheldon v. Newton*, 3 Ohio St. 494; *Horner v. State Bank*, 1 Ind. 180, 48 Am. Dec. 355; *Evans v. Ashby*, 22 Ind. 15; *Wiley v. Parvey*, 61 Ind. 457, 28 Am. Rep. 677; *Lane v. Bommelmänn*, 17 Ill. 95; *Swiggart v. Harber*, 4 Scam. 364, 39 Am. Dec. 418; *Wales v. Bogue*, 31 Ill. 464; *McBane v. People*, 50 Ill. 503; *Cameron v. Boyle*, 2 Greene (Iowa), 154; *Burton v. Warren Twp.*, 11 Iowa, 166; *Perryman v. State*, 8 Mo. 208; *State v. St. Gemme*, 31 Mo. 280; *Lucas v. Todd*, 28 Cal. 183.

²⁹ *Breeze v. Doyle*, 19 Cal. 101.

deceive a person accustomed to such documents, are no ground for impeaching the judgment collaterally.⁸⁰ So if the judgment in a foreclosure case is entered prematurely, the remedy of the defendant must be sought by direct proceedings in the action.⁸¹ The judgment of a court having jurisdiction is not rendered void or open to a collateral attack, because of a wrong judgment based upon an erroneous application of legal principles or insufficient evidence.⁸² To take another illustration,—a guardian's sale of land, if not made at the time required by law, is illegal; but if the court improperly confirms it, its judgment is not open to collateral inquiry in a suit for the land, brought against a party who acquired the title under the purchaser at such sale in good faith.⁸³ So, when a judgment in replevin is offered in evidence in another suit, it cannot be objected to it that it gives costs in a case where costs ought not to be given by the statute; the judgment, though wrong, is conclusive when offered collaterally.⁸⁴

§ 262. Mistakes in the Judgment.

Closely allied to the principle just discussed is the rule that a *mistake* in the rendition or entry of a judgment can be taken advantage of only in a direct proceeding. A final judgment cannot be collaterally impeached because the opinion of the court shows that a different judgment should have been entered.⁸⁵ So a judgment ordering the delivery of all the property of an intestate to his widow, instead of to her *in trust* for his minor children, as provided by the statute, though palpably erroneous, is proof against collateral attack.⁸⁶ So again, in an action to recover from a purchaser part of certain lands sold under a decree of court, the plaintiff, if a party to the suit in which the decree of sale was made, cannot, in answer to the defense of *res judicata*, attack the decree of sale collaterally

⁸⁰ *Morrison v. Austin*, 14 Wis. 601.

⁸¹ *Alderson v. Bell*, 9 Cal. 315.

⁸² *Stevenson v. Bonesteel*, 30 Iowa, 286.

⁸³ *Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607.

⁸⁴ *Lutes v. Alpaugh*, 23 N. J. Law, 165.

⁸⁵ *Cooley v. Smith*, 17 Iowa, 29.

⁸⁶ *Spencer v. McGonagle*, 107 Ind. 410, 8 N. E. Rep. 266.

by showing that that part of the lands was included in the decree by inadvertence and mistake.⁹⁷

§ 263. Irregular or Defective Service.

We have already seen that defects or irregularities in the process, or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely nugatory, in which case the judgment fails for want of jurisdiction.⁹⁸ It follows that the judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice, although such service of notice may be materially defective.⁹⁹ Thus a judgment cannot be impeached in a collateral proceeding on the ground that the return of service of process was not made in a formal manner;¹⁰⁰ nor because the service of the writ did not conform to the requirements of the statute;¹⁰¹ nor because service of the summons was made upon the return day.¹⁰² So a judgment against a corporation, where process was served on individuals who are not called officers, is erroneous, and would probably be reversed on error; nevertheless it cannot be impeached by a stranger, in a suit in equity to which the corporation, the stockholders, and the persons so served are parties, when they make no objection, and no fraud or collusion is charged.¹⁰³ It is held that a recital in a judgment that the defendant was legally served with process cuts off all inquiry in a collateral proceeding as to the legality of the service.¹⁰⁴ But on the other hand, where the affidavits of service in an action were wholly insufficient to authorize the court to enter judgment, and such defect appeared upon the face of the judgment-roll, it was held that the judgment might be impeached collaterally.¹⁰⁵ Where the court has

⁹⁷ *Jones v. Coffey*, 97 N. Car. 847, 2 S. E. Rep. 165.

⁹⁸ *Supra*, §§ 223, 224.

⁹⁹ *McCormick v. Webster*, 89 Ind. 105; *Murray v. Weigle*, 118 Pa. St. 159, 11 Atl. Rep. 781; *Allison v. Rankin*, 7 Serg. & R. 269; *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. Rep. 490.

¹⁰⁰ *Campbell v. Hays*, 41 Miss. 561.

¹⁰¹ *Cole v. Butler*, 43 Me. 401.

¹⁰² *Dutton v. Hobson*, 7 Kans. 196.

¹⁰³ *Fahs v. Taylor*, 10 Ohio. 104.

¹⁰⁴ *Dunham v. Wilfong*, 69 Mo. 355.

¹⁰⁵ *Hyde v. Redding*, 74 Cal. 493, 16 Pac. Rep. 880.

jurisdiction of the subject-matter and the parties, and no fraud is shown, if judgment is confessed before the time for answering expires, this will not overthrow the judgment on a collateral attack, but all necessary presumptions will be entertained to support it.¹⁰⁶

§ 264. Objections as to Parties.

As a general rule, any irregularity in regard to the number, character, or joinder of the parties to an action must be objected to at a proper time and manner in the progress of the suit, and will not justify a collateral impeachment of the judgment. For instance, where jurisdiction is not disputed, a misjoinder of parties is a mere error of practice, and cannot be taken advantage of, in an action of ejectment, to defeat the title of a purchaser at a sheriff's sale under the judgment.¹⁰⁷ So, "multifariousness as to subjects or parties, within the jurisdiction of a court of equity, cannot be taken advantage of by a defendant except by demurrer, plea, or answer to the bill, although the court in its discretion may take the objection at the hearing, or on appeal, and order the bill to be amended or dismissed. *A fortiori* it does not render a decree void, so that it can be treated as a nullity in a collateral action."¹⁰⁸ A judgment entered in favor of a plaintiff, *against himself* and others, and revived to the use of one to whom it has been assigned, is valid as against a creditor of the plaintiff whose judgment is rendered after the revival.¹⁰⁹ On similar principles, a judgment in an action for delinquent taxes, being apparently regular, cannot be attacked collaterally on the ground that the suit should have been brought in the name of a different official plaintiff.¹¹⁰

¹⁰⁶ *White v. Crow*, 110 U. S. 188, 4 Sup. Ct. Rep. 71.

¹⁰⁷ *Levan v. Milholland*, 114 Pa. St. 49, 7 Atl. Rep. 194.

¹⁰⁸ *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747.

¹⁰⁹ *Sponsler's Appeal* (Pa.), 17 Atl. Rep. 1097.

¹¹⁰ *Somers v. Losey*, 48 Mich. 294, 13 N. W. Rep. 183.

§ 265. Legal Disability of Parties.

In an earlier chapter, we discussed at some length the validity of judgments against married women, infants, lunatics, and deceased persons. In regard to the former class of persons, it appeared to be the settled doctrine in many of the states that, in the absence of enabling statutes, a judgment against a *feme covert* is absolutely void.¹¹¹ If this position is taken, it inevitably follows that such a judgment may be, on that ground, impeached and avoided in any collateral proceeding. But it was shown in the same connection that numerous courts prefer to consider such judgments as voidable only, especially where the defense of coverture is not set up, but the defendant suffers a default.¹¹² It is unnecessary to repeat the discussion in this place. But the reader, in considering the sections cited, should keep in mind the rule that it is only when a judgment is *absolutely void* that it can be impeached collaterally, not when it is merely voidable.¹¹³ And a further suggestion may be added,—that the real question is one of jurisdiction; for if the court may take jurisdiction of a married woman, a judgment rendered against her may be erroneous on account of her abnormal status, but will not be null. What is here said of married women will apply, with some modifications, to the case of infants.¹¹⁴ But, by the general consensus of authority, a judgment against a lunatic is not to be considered as entirely void, and therefore it will be protected from collateral attacks.¹¹⁵ It is a different question in regard to the validity of judgments against joint defendants, a part of whom were persons under legal disabilities or were not served with process. Whatever may be thought of the effect of such judgment upon the defendant who was

¹¹¹ *Supra*, §§ 188-192.

¹¹² In Pennsylvania, while it is true that the mortgage of a married woman is invalid unless separately acknowledged by her, and the absence of such acknowledgment may be set up as a defense to a recovery on the mortgage, yet if judgment be recovered on a *scire facias* issued on such mortgage, the

judgment is conclusive that the mortgage was properly executed, and the validity thereof cannot be questioned in a collateral action of ejectment. *Michaelis v. Brawley*, 109 Pa. St. 7.

¹¹³ For the difference between void and voidable judgments, see § 170.

¹¹⁴ *Supra*, §§ 193-198.

¹¹⁵ *Supra*, § 205.

incapacitated or not within the jurisdiction, it seems but reasonable to hold it binding upon the other, supposing no similar objection to exist in his case. It might, as to him, be erroneous or voidable, but it should not be open to him, or to any other person in respect to him, to impeach it collaterally. This view was shown, in a preceding section, to be consonant to sound legal reason and supported by many weighty decisions.¹¹⁶

§ 266. Disqualification of Judge.

Notwithstanding some difference of opinion, it seems to be the more generally accepted doctrine that a decision rendered by a judge who was disqualified by reason of his interest in the subject-matter of the controversy is null and void, and that this may be shown against it in a collateral proceeding;¹¹⁷ but that if the objection goes to the competence of the judge, on account of his relationship to one of the parties litigant, it will have no greater effect than to make the judgment erroneous or voidable, not laying it open to indirect impeachment.¹¹⁸ Especially is this the case where the statutes authorize the parties to waive an objection of this character. The judgments and orders of a *de facto* judge, as we have already seen, are everywhere recognized as valid and binding, and of course they cannot be attacked collaterally on any allegation against the title of the person acting as judge.¹¹⁹

§ 267. Judgment for Excessive Amount.

If judgment is rendered for a sum exceeding the amount laid in the *ad damnum* clause of the writ, or claimed in the declaration or

¹¹⁶ *Supra*, § 211. See *Bailey v. McGinness*, 57 Mo. 882.

¹¹⁷ *Supra*, § 174.

¹¹⁸ *Supra*, § 174. Compare *Pierce v. Bowers*, 8 Baxt. 853.

¹¹⁹ *Supra*, § 175. When a judgment has been rendered by a court of general jurisdiction against a person over whom

it had acquired jurisdiction, it cannot be attacked, in a proceeding to enjoin its collection, by a party to the judgment, on the ground that the special judge appointed by agreement was not regularly appointed and qualified. *Littleton v. Smith* (Ind.), 21 N. E. Rep. 686.

complaint, or notified to the defendant by the indorsement on the summons, it is irregular and erroneous and is liable to reversal, but it is not void, and it cannot be impeached collaterally.¹²⁰

§ 268. Insufficiency of Evidence.

When a judgment is rendered in a cause by a court whose jurisdiction over the subject-matter and the person of the defendant is not questioned, it cannot be attacked in any collateral proceeding by a showing that the evidence on which it was based was illegal, improperly received, or insufficient to sustain the judgment.¹²¹ This very clear and sensible rule rests on several principles. In the first place, an objection of that sort does not go to the jurisdiction, and consequently the judgment cannot be void, although it may be erroneous. Again, the legality and sufficiency of the evidence is a question for the court to determine, and its decision should be accepted as final and conclusive, unless in an appellate court. Finally, if such re-opening of the cause were allowed, the doctrine of *res judicata* would be despoiled of its very salutary effect.

§ 269. Illegal or Insufficient Cause of Action.

A judgment cannot be impeached collaterally on account of any illegality or insufficiency in the cause of action on which the suit is brought; these are matters which must be set up in defense to the action, and which are concluded by the judgment.¹²² Thus, where a judgment creditor brings a bill to enforce satisfaction of his judgment by charging equities, the judgment debtor cannot be permitted to show in defense that the contract upon which the judgment was rendered was infected with usury or other illegality.¹²³ So a judgment, when

¹²⁰ *Smith v. Keen*, 26 Me. 411; *Chaffee v. Hooper*, 54 Vt. 518; *Bond v. Pacheco*, 80 Cal. 530; *Savage v. Hussey*, 8 Jones, 149; *supra*, § 188.

¹²¹ *Odle v. Frost*, 59 Tex. 684; *Martin v. Porter*, 4 Heisk. 407; *Pollock v. Bule*,

48 Miss. 140; *Bartlett v. Russell*, 41 Ga. 196.

¹²² *State v. Beloit*, 20 Wis. 79; *Lewis v. Armstrong*, 45 Ga. 181; *Bushee v. Surles*, 77 N. Car. 62.

¹²³ *Bank of Wooster v. Stevens*, 1 Ohio St. 233, 59 Am. Dec. 619.

attacked collaterally, will not be held to be void merely because the pleading upon which it is based seems to show upon its face that the action, when commenced, was barred by some statute of limitations.¹²⁴ A judgment rendered in a suit founded on an obligation before its maturity, is not subject to collateral attack.¹²⁵ And a judgment in an attachment suit cannot be impeached indirectly by showing that the creditor had no such demand against the defendant in attachment as would sustain that species of process.¹²⁶ Again, where a judgment is entered on a mortgage, the judgment will conclusively establish the due execution of the mortgage, although the latter may have been in fact void; the mortgage is merged in the judgment, which cannot be collaterally impeached except for fraud.¹²⁷

PART III. FOR WANT OF JURISDICTION.

§ 270. Jurisdiction of Superior Courts presumed.

Before proceeding to consider in detail the permissibility of collaterally attacking judgments and decrees on an allegation of want of jurisdiction, it is necessary to advert to the presumption of law by which the acts and proceedings of courts of record are supported. It is a maxim, *omnia præsumentur rite et solenniter esse acta*.¹²⁸ And this maxim, while often applied to transactions between private persons, has a special and peculiar applicability to the proceedings of public officers, and, more than in any other case, to the acts of the courts.¹²⁹ It is presumed that the doings of a court of record are regular and proper, that its jurisdiction was properly acquired, that its proceedings are legal and valid, and that its decisions are well-founded and free from error. "There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to

¹²⁴ *Head v. Daniels*, 38 Kans. 1, 15 Pac. Rep. 911.

¹²⁵ *Mikeska v. Blum*, 63 Tex. 44; *Robertson v. Huffman*, 92 Ind. 247.

¹²⁶ *Harrison v. Pender*, Busbee L. 79, 57 Am. Dec. 578; *Brantingham v. Brantingham*, 12 N. J. Eq. 160.

¹²⁷ *Butterfield's Appeal*, 77 Pa. St. 197;

Michaelis v. Brawley, 109 Pa. St. 7; *Hartman v. Ogborn*, 54 Pa. St. 120, 93 Am. Dec. 679; *Woolery v. Grayson*, 110 Ind. 149, 10 N. E. Rep. 985.

¹²⁸ *Co. Litt.* 232; *Broom's Maxims*, 942.

¹²⁹ *Reed v. Jackson*, 1 East, 355; *Lytleton v. Cross*, 8 B. & C. 327.

have been rightly done, until the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged."¹²⁰ Hence, jurisdiction having been once acquired over the parties and the subject-matter, every presumption is in favor of the legality of the judgment.¹²¹

Coming now to the matter in more immediate contemplation, it is a part of this principle that the jurisdiction of the court cannot be collaterally denied. And the rule in this connection rests partly upon the maxim already quoted, and partly upon the peculiar doctrine which attaches the utmost conclusiveness to judicial records, and partly upon considerations of public policy which will be adverted to hereafter. But the rule must be taken with certain very important modifications. For first, it applies in its fullness only to the acts and judgments of courts of general jurisdiction or courts of record. We are told that nothing is intended to be out of the jurisdiction of a superior court but what specially appears to be so, and nothing is intended to be within the jurisdiction of an inferior court but what is specially alleged.¹²² This point will be discussed in a later section. Again, in the case of foreign judgments, the presumption, though recognized, is not of great weight, and is always liable to be rebutted by evidence to the contrary. Finally, the presumption is not absolutely conclusive. For it may be contradicted by the face of the record. Whether it may be rebutted by extraneous evidence is a moot question, which we reserve for discussion in a subsequent connection. But there is no question that want of jurisdiction, if shown by the

¹²⁰ *Voorhees v. Jackson*, 10 Pet. 449, 472, Baldwin, J.; *Hughes v. Cummings*, 7 Colo. 138, 2 Pac. Rep. 289. All presumptions are in favor of the regularity of the proceedings of courts of record when collaterally assailed, and where a decree contains the finding of a fact specially which is pleaded in the petition, it must be presumed that suf-

ficient evidence was submitted to the court to justify such finding. *Hilton v. Bachman*, 24 Nebr. 490, 89 N. W. Rep. 419.

¹²¹ *Blake v. Lyon Manuf. Co.*, 77 N.Y. 626.

¹²² *Kenney v. Greer*, 18 Ill. 432, 54 Am. Dec. 439.

record itself, may be urged against the judgment at any time and in any proceeding. Thus guarded against undue breadth of statement, we are prepared to formulate the rule which is recognized and accepted by all the authorities, viz., the judgment of a domestic court, having general and superior jurisdiction, is always to be presumed regular and valid and founded upon jurisdiction properly and duly acquired, until the contrary is definitely made to appear in some permissible manner.¹²³ Hence, when a court of general jurisdiction pronounces judgment, the presumption is in favor of its jurisdiction, and it is not incumbent upon one who bases a right upon such judgment to aver facts essential to the existence of jurisdiction.¹²⁴ And whatever is upon the records of such a court is presumed to be rightfully there.¹²⁵ It is therefore important to consider the various conditions which the record may present in a given case,—as, whether it be complete or deficient, and whether it contain recitals as to jurisdiction or not,—and ascertain how the presumption will apply in the various circumstances. And this will now engage our attention.

¹²³ *Voorhees v. Jackson*, 10 Pet. 449; *Kennedy v. Georgia State Bank*, 8 How. 586; *McCormick v. Sullivan*, 10 Wheat. 192; *Blaisdell v. Pray*, 68 Me. 269; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Morse v. Presby*, 25 N. H. 299; *Carleton v. Washington Ins. Co.*, 35 N. H. 162; *Wingate v. Haywood*, 40 N. H. 487; *Mercier v. Chace*, 9 Allen, 242; *Hendrick v. Whittemore*, 105 Mass. 28; *Coit v. Haven*, 30 Conn. 190; *Ray v. Rowley*, 4 Thomp. & C. 48; *Hering v. Chambers*, 108 Pa. St. 175; *Clark v. Bryan*, 16 Md. 171; *Woodhouse v. Filbates*, 77 Va. 817; *Hill v. Woodward*, 78 Va. 765; *Wilson v. Wilson*, 18 Ala. 176; *Pender v. Felts*, 2 Sm. & Mar. 535; *Hardy v. Gholson*, 26 Miss. 70; *Briggs v. Clark*, 7 How. (Miss.) 457; *Horan v. Wahrenberger*, 9 Tex. 813, 58 Am. Dec. 145; *Venable v. McDonald*, 4 Dana, 386; *Adams v. Jeffries*, 12 Ohio, 253, 40 Am. Dec. 477; *Callen v. Ellison*, 18 Ohio St. 446; *Wiley v. Pratt*, 23 Ind. 628; *Pardon v. Dwire*, 23 Ill. 572; *Kenney v. Greer*, 18 Ill. 432,

54 Am. Dec. 439; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Coleman v. McKnight*, 4 Mo. 88; *McGirk v. Chauvin*, 8 Mo. 287; *Gemmell v. Rice*, 18 Minn. 400, (Gil. 371); *Reinig v. Hecht*, 58 Wis. 212, 16 N. W. Rep. 548; *Hahn v. Kelly*, 34 Cal. 891. In *Newcomb's Exr. v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222, it is said that the proceedings of the courts of Kentucky are not conducted according to the course of the common law, but are regulated by the code of practice; and in regard to judgments by courts of general jurisdiction within the state, the same presumptions must be indulged whether the judgment or proceeding follows the common law or is regulated by the statute, unless the statute prescribes a different rule for determining the validity of the judgment.

¹²⁴ *Jackson v. Dyer*, 104 Ind. 516, 3 N. E. Rep. 863.

¹²⁵ *Drake v. Duvenick*, 45 Cal. 455.

§ 271. Silence or Incompleteness of the Record.

The presumption in favor of the jurisdiction of superior courts is most frequently invoked in aid of their judgments in cases where the record is silent on the subject of jurisdiction. It may be defective or incomplete in consequence of the loss or absence of parts of the record or from the omission of proper recitals. Or the record, though apparently complete and regular, may say nothing on the subject of jurisdiction. Or its deliverances may be obscure and ambiguous. For any of these reasons the record may fail to show affirmatively that the court had jurisdiction of the subject and persons, while yet it does not distinctly show a *want* of jurisdiction. In any of these cases the weight of authority sustains the rule that the judgment, if rendered by a superior domestic court, will sustain itself against any collateral attack by parties or privies on account of any alleged want of jurisdiction.¹³⁶ The rule is equally applicable in cases where there are numerous parties; the fact that the record is silent upon some matter touching the jurisdiction over some of the defendants does not affect the presumption in its favor.¹³⁷ So where two defendants are sued *ex contractu* and one confesses judgment for both, the authority to do so need not appear in the record, nor can the judgment of the court be collaterally impeached for this supposed defect.¹³⁸ Where the record does not show that a default was not properly entered, the presumption arises that the required notice was given.¹³⁹ Hence, when a party seeks in any collateral action to impeach the judgment or decree of a court of superior jurisdiction, on the ground that he had no legal notice of the pendency of the action, it is necessary that he should allege in his pleading what, if anything, is shown by the record in relation to the issue and service of process, because, unless the record itself shows that the court never acquired

¹³⁶ *Horner v. State Bank*, 1 Ind. 130, 48 Am. Dec. 355; *Coit v. Haven*, 30 Conn. 190; *Lawler v. White*, 27 Tex. 250; *Mitchell v. Meuley*, 32 Tex. 460; *Messinger v. Kintner*, 4 Binn. 97; *Swearengen v. Gulick*, 67 Ill. 208; *Goar v. Maranda*, 57 Ind. 339; *Fogg v. Gibbs*,

8 Baxt. 464; *Hahn v. Kelly*, 34 Cal. 391; *Sharp v. Brunnings*, 35 Cal. 528.

¹³⁷ *Kramer v. Breedlove* (Tex.), 3 S. W. Rep. 561.

¹³⁸ *Jackson v. Tift*, 15 Ga. 557.

¹³⁹ *Evans v. Young*, 10 Colo. 316, 15 Pac. Rep. 424.

jurisdiction of him, it will be conclusively presumed that the jurisdiction did attach.¹⁴⁰ Nor is it enough to overcome this presumption that the judgment-roll is defective, or that some of the papers which should properly constitute a part of it are wanting.¹⁴¹ Thus, where the papers in a case are all lost, and the record states that the judgment was taken by default without a jury, the court will presume that it was a case where such would have been the proper proceeding.¹⁴² So where only part of the record is given in evidence, that part of it which relates to process and appearance being by agreement of parties withheld, it will be presumed that all parties who are named as such in the pleadings and judgment were properly before the court.¹⁴³ Again, where the docket showed a summons "returned on oath," but not that it had been served, it was held that the judgment was merely irregular and could not be impeached collaterally.¹⁴⁴ Where the record fails to state that the judgment was rendered at a regular term of the court, but states that it was entered on May 6, 1885, it will be presumed, in the absence of contrary evidence in the record, that the judgment was rendered at a regular term duly fixed by law.¹⁴⁵ "Where nothing whatever is shown, if evidence were necessary to have authorized the particular decision complained of, it will be presumed that the evidence was before the court and that it fully justified the conclusion reached. If a party rely upon the fact that there was no evidence in a case, where evidence was necessary, he must establish it by a proper bill of exceptions, or he will fail."¹⁴⁶ The same rule governs the case of an ambiguity or obscurity in the record. Thus, where two demurrers to a declaration were on file, and the judgment of the court refers to the "said demurrer," without specifying which

¹⁴⁰ *Exchange Bank v. Ault*, 103 Ind. 322, 1 N. E. Rep. 563.

¹⁴¹ *Herrick v. Butler*, 30 Minn. 156, 14 N. W. Rep. 794.

¹⁴² *Fogg v. Gibbs*, 8 Baxt. 464.

¹⁴³ *Welsh v. Childs*, 17 Ohio St. 319. Where the transcript of a law record, filed in an equity cause, showed a judgment by default, but did not purport to contain the process, and showed no service of process, but an answer and

cross-bill admitted an agreement as to the management and conduct of the suit at law, *held*, sufficient evidence of appearance to sustain the judgment. *Crank v. Flowers*, 4 Heisk. 629.

¹⁴⁴ *Sloan v. McKinstry*, 18 Pa. St. 120.

¹⁴⁵ *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. Rep. 565.

¹⁴⁶ *Credit Foncier of America v. Rogers*, 10 Nebr. 184, 4 N. W. Rep. 1012, per Lake, J.

of them, it will be presumed that the court passed upon both.¹⁴⁷ So where, by reason of the loss of the record or any part of it, there is difficulty in discovering the ground upon which jurisdiction was taken in the particular case, if there be any ground upon which the court could rightfully have taken cognizance of the case, it will be presumed that it assumed jurisdiction on that ground, unless it be made to appear affirmatively by the record that it was taken on some other ground. "And if, in any case, from what remains of the record, it appears doubtful what was the real ground upon which it took jurisdiction, and it shall also appear from the proceedings that there were several grounds upon which the court seemingly acted, it will be assumed that cognizance was taken upon that one of the grounds which would give jurisdiction, if any such there be, and not upon either of the others."¹⁴⁸

§ 272. Appearance by Attorney.

It has been made a question whether the presumption in favor of jurisdiction should be extended to the case where the record shows an appearance by attorney, which is apparently regular but was in fact unauthorized. Many of the cases lay down the rule, in the most uncompromising terms, that a judgment recovered against a defendant who was not served with process and had no knowledge of the suit, but for whom an attorney appeared, although without authority, can by no means be attacked for want of jurisdiction in any collateral proceeding, and is binding upon the defendant.¹⁴⁹ But on the other hand, there is not wanting authority for the view that the authority of the attorney may always be controverted.¹⁵⁰ The best and safest rule, in our judgment, is that formu-

¹⁴⁷ *Watson v. Hahn*, 1 Colo. 385.

¹⁴⁸ *Woodhouse v. Filbates*, 77 Va. 817.

¹⁴⁹ *Brown v. Nichols*, 43 N. Y. 26; *Hamilton v. Wright*, 37 N. Y. 502; *Reed v. Pratt*, 2 Hill, 64; *Hoffmire v. Hoffmire*, 8 Edw. Ch. 174; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Finneran v. Leonard*, 7 Allen, 54, 83 Am. Dec. 665; *Lowe v. Stringham*, 14 Wis. 222;

Baker v. Stonebraker, 34 Mo. 175; *Carpentier v. Oakland*, 30 Cal. 439; *Field v. Gibbs*, 1 Pet. C. C. 155.

¹⁵⁰ *Wiley v. Pratt*, 23 Ind. 628; *Hess v. Cole*, 23 N. J. Law, 125; *Shumway v. Stillman*, 6 Wend. 453; *Shelton v. Tiffin*, 6 How. 163. See *Wright v. Andrews*, 130 Mass. 149.

lated in a recent case in Kansas, where it is said that while a judgment resting upon the unauthorized appearance of an attorney is void, yet an attorney's appearance, for a defendant whom he professes to represent, is presumed to be authorized until the contrary is shown; and it devolves upon the defendant impeaching this authority to show by positive proof that such appearance is invalid; and all the presumptions are in favor of a finding of the trial court that the appearance of the attorney is binding upon the defendant.¹⁵¹ If the case is that of a judgment rendered in another state, a recital in the record that the defendant appeared by attorney is conclusive of the fact that the attorney did appear, but not that he had authority to appear.¹⁵²

§ 273. Jurisdictional Recitals.

It commonly happens that the record itself will furnish evidence on the question of the jurisdiction of the court. And notwithstanding some vigorous dissent, the great majority of the decisions hold (in the case of a domestic as distinguished from a foreign judgment) that if the record shows the facts necessary to confer jurisdiction, or recites that jurisdiction did in fact attach, its averments are final and conclusive in every collateral proceeding, and cannot be contradicted by any extraneous evidence.¹⁵³ This is in consequence of the great sanctity attached to judicial records by the common law and their "uncontrollable verity." It is said: "If upon inspection of the record it appears that no notice has been given, the judgment or decree is void. On the other hand, if it be a judgment or decree of a domes-

¹⁵¹ *Reynolds v. Fleming*, 30 Kans. 106, 1 Pac. Rep. 61, 46 Am. Rep. 86.

¹⁵² *Infra*, vol. 2, § 908.

¹⁵³ *McCormick v. Sullivan*, 10 Wheat. 192; *Walker v. Cronkite*, 40 Fed. Rep. 133; *Granger v. Clark*, 22 Me. 128; *Morse v. Presly*, 25 N. H. 299; *Cook v. Darling*, 18 Pick. 398; *Coit v. Haven*, 80 Conn. 190, 79 Am. Dec. 244; *Hartman v. Ogborn*, 54 Pa. St. 120, 98 Am. Dec. 679; *Maples v. Mackey*, 89 N. Y. 146;

Clark v. Bryan, 16 Md. 171; *Miller v. Ewing*, 8 Sm. & Mar. 421; *Dufour v. Camfranc*, 11 Martin (La.), 607, 18 Am. Dec. 360; *Smith v. Wood*, 87 Tex. 616; *Simmons v. McKay*, 5 Bush, 25; *Callen v. Ellison*, 18 Ohio St. 446, 82 Am. Dec. 448; *Rogers v. Beauchamp*, 102 Ind. 83, 1 N. E. Rep. 185; *Moffitt v. Moffitt*, 69 Ill. 641; *Hahn v. Kelly*, 84 Cal. 391, 94 Am. Dec. 742; *McAuley v. Fulton*, 44 Cal. 355.

tic court of general jurisdiction, and the record declares that notice has been given, such declaration cannot be contradicted by extrinsic proof. In such cases the judgment or decree is sustained, not because a judgment rendered without notice is good, but because the law does not permit the introduction of evidence to overthrow that which for reasons of public policy it treats as absolute verity. The record is conclusively presumed to speak the truth, and can be tried only by inspection. This results from the power of the court to pass upon every question which arises in the cause, including the facts necessary to the exercise of its jurisdiction, and as to which, therefore, its judgment, unless obtained by fraud or collusion, is binding, until reversed, on every other court."¹⁵⁴ Hence a recital in a judgment that the original process was served on the defendant, or that publication (when allowed in lieu of service of process) was made, or that the party appeared by attorney or by answer, is conclusive when the record is collaterally put in issue, unless the recital is positively contradicted by the record itself.¹⁵⁵ We proceed to illustrate the rule here stated by an account of certain typical cases. In *Reilly v. Lancaster*,¹⁵⁶ the validity of a tax judgment was collaterally involved. It contained a recital that "all the owners and claimants of the property above described have been duly summoned to answer the complaint herein and have made default in that behalf." It appeared, however, that the name of one of the owners was omitted from the printed summons, which was served by publication. Yet the judgment was sustained, the court indulging the presumption that there was adequate proof of service on that defendant although it did not appear in the record. In an important Ohio decision the record of a judgment declared that "the defendants, by C., their attorney, came into court, and by virtue of his power of attorney filed in this case, confessed judgment," etc. It was sought in a collateral proceeding to show that the only power of attorney among the papers in the case, and which was marked with the proper number of

¹⁵⁴ *Wilcher v. Robertson*, 78 Va. 602.

¹⁵⁵ *Harris v. McClanahan*, 11 Lea, 181.

¹⁵⁶ 39 Cal. 354. And see *Sharp v. Brunnings*, 85 Cal. 528; *Hahn v. Kelly*,

84 Cal. 391; *Branson v. Caruthers*, 49

Cal. 875; *Bateman v. Miller* (Ind.), 21

N. E. Rep. 292.

the case, did not appear to be signed by some of the defendants, and that such defendants were at the time married women, and thereby to show that the judgment was rendered without jurisdiction and was void. But it was held that evidence of such facts could not be received to impeach the validity and effect of the judgment.¹⁸⁷

But while it is inadmissible to contradict the record by extrinsic evidence, it is always open to the party to show that one part of the record contradicts another part. Thus the recital of service in a judgment may be contradicted by producing the original summons and return.¹⁸⁸ But the contradiction must be explicit and irreconcilable. It is not enough that the recital seems to be contradicted by *inferences* drawn from other parts of the record. For example, where the service of a summons to the September term of court was defective, and the cause was continued without any steps being taken, and at the ensuing term a decree was rendered which recited that the defendants "were duly served ten days before the first day of the October term," and the record contained only the summons to the September term, it was held that there was nothing appearing in the record to rebut the presumption in favor of the jurisdiction of the court as indicated by its finding in the decree.¹⁸⁹ So in an action against two defendants jointly, on a promissory note, personal service was had on one of them and the other was served by publication; the record did not show that the latter had filed any pleadings in the case, but the judgment of the court recited that "both parties waived a jury, and submitted the cause to the court upon the law and facts;" and it was held that the record disclosed a personal appearance of both defendants, and the recitals of the judgment were conclusive.¹⁹⁰ A very strong application of this rule of ascribing absolute verity to the record was made in a recent case in Texas. It was a collateral attack upon the judgment of a domestic court of general jurisdiction, and the nullity of the judgment for want of jurisdiction over the person of the defendant was insisted on, because the return upon the writ of citation showed that the alleged publication, as therein

¹⁸⁷ Callen v. Ellison, 18 Ohio St. 446,
62 Am. Dec. 448.

¹⁸⁸ Turner v. Jenkins, 79 Ill. 228.

¹⁸⁹ Smith v. Wood, 37 Tex. 616.

¹⁹⁰ Pardon v. Dwire, 23 Ill. 572.

recited, could not have been made. The judgment, however, recited that the defendant failed to appear and answer "but wholly made default, *although* duly cited with process." It was held that, to determine whether the record shows affirmatively that there was proper service, the whole of it must be considered together, and that the recital in the judgment, which was the last act of the court in the case, that the defendant was "duly cited," imported absolute verity.¹²²

§ 274. Decision of the Court upon its own Jurisdiction.

The fact of its own jurisdiction may become a matter in issue before the court, or a question which it must determine before proceeding with the case, and then its decision that it has jurisdiction is generally considered final and conclusive in all collateral inquiries. When the jurisdiction of a court depends upon a fact which it is required to ascertain in its decision, such decision is binding until reversed in a direct proceeding.¹²³ Where a statute confers general jurisdiction over a class of cases upon a particular tribunal, its decision upon the facts essential to the existence of jurisdiction in a particular case belonging to the class will be conclusive as against collateral attack.¹²⁴ So when a notice which is defective, or the service of which is informal, has been adjudged sufficient, the judgment rendered thereunder will not be held void in a collateral proceeding.¹²⁴ And in case of an insufficient service of notice, if the court decides the question of jurisdiction erroneously, the judgment will be voidable but binding until reversed on appeal.¹²⁵ The determination of the question of the sufficiency of the affidavits presented to the court as proof of the service of a summons and the failure of

¹²¹ Treadway v. Eastburn, 57 Tex. 209.

¹²² Otis v. The Rio Grande, 1 Woods, 279. Thus the finding of the court that a person assuming to act as guardian was in fact such is sufficient *prima facie* to show that the court had obtained jurisdiction over the ward. Merritt's Lessee v. Horne, 5 Ohio St. 307, 67 Am. Dec. 298.

¹²³ City of Delphi v. Startzman, 104 (336)

Ind. 343, 8 N. E. Rep. 937; Dequindre v. Williams, 81 Ind. 444.

¹²⁴ Farmers' Ins. Co. v. Highsmith, 44 Iowa, 330, citing Shawhan v. Loffer, 24 Iowa, 217; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Morrow v. Weed, 4 Iowa, 77, 66 Am. Dec. 123; Lyon v. Vanatta, 35 Iowa, 525; Woodbury v. Maguire, 42 Iowa, 339.

¹²⁵ Bonsall v. Isett, 14 Iowa, 309.

the defendant to answer, is a judicial determination of the question of jurisdiction, and therefore binding until set aside or reversed.¹⁶⁶ But in California, the decision of the probate court upon jurisdictional facts in a particular case is not conclusive upon parties not actually before the court, and can be questioned in a direct suit in the same court.¹⁶⁷ And it is said that when the record discloses the *evidence* of jurisdiction on which the court acted, its finding that it had jurisdiction is not conclusive unless the facts shown support it.¹⁶⁸

§ 275. Cases denying Conclusiveness of Record.

The preceding sections show the immense preponderance of authority to be in favor of the rule that a judgment of a superior court can never be impeached collaterally for want of jurisdiction not appearing on its face. This rule, as we stated, is limited to domestic judgments. For in the case of a judgment coming from a sister state or a foreign country, it is agreed on all hands that want of jurisdiction may always be shown against it. But this is a special and peculiar question, and must be carefully separated from the point now under consideration. That being done, we still find a certain number of cases squarely denying the generally accepted rule. It is held in Texas that the doctrine of the absolute verity of a record does not apply when the want of jurisdiction is made a question. "This may always be set up when a judgment is sought to be enforced or any benefit is claimed under it; and this is not inconsistent with the principle which ordinarily forbids the impeachment or contradiction of a record."¹⁶⁹ So in New York. "The want of jurisdiction in a court rendering a judgment may be shown collaterally whenever any benefit or protection is sought under the judgment."¹⁷⁰ In a recent Massachusetts decision it was held that a domestic judgment may be impeached, in an action thereon, by evidence that, at the time the

¹⁶⁶ Hotchkiss v. Cutting, 14 Minn. 537 (Gil. 408).

¹⁶⁷ Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237.

¹⁶⁸ Senichka v. Lowe, 74 Ill. 274. See, also, Goudy v. Hall, 80 Ill. 109.

¹⁶⁹ Fitzhugh v. Custer, 4 Tex. 391, 51

Am. Dec. 728; Thouvenin v. Rodrigues, 24 Tex. 468; Smith v. Tupper, 4 Sm. & Mar. 261, 43 Am. Dec. 483; Brown v. Balde, 8 Lans. 283.

¹⁷⁰ Putnam v. Man, 8 Wend. 202, 20 Am. Dec. 686.

suit was brought, the defendant therein was a non-resident of the state and had no notice of its commencement or pendency.¹⁷¹ So in Kansas it is held permissible to attack a judgment collaterally by proof that the sheriff's return of personal service is false and that defendant in reality never had notice of the action.¹⁷² In another state, a recital in an order that a party appeared does not prevent him from showing at all times that he neither was served nor appeared.¹⁷³

But the most important decision on this side of the question is that of *Ferguson v. Crawford*.¹⁷⁴ In this case the well-considered and well-reasoned opinion, by Judge Rapallo, contains such a discriminating review of the authorities, and such pertinent observations on the merits of the issue, that we find it necessary to quote from it at some length. "After considerable research," says the learned judge, "I have been unable to find a single authoritative adjudication, in this or any other state, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring states holding that, in the case of such judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the court over the person as well as the subject-matter, unless it appear on the face of the record that the court had not acquired jurisdiction; and that in such cases there is a conclusive presumption of law that jurisdiction was acquired by service of process or the appearance of the party. The cases are very numerous, but the citation of a few of them will suffice." He then proceeds to review and comment upon the principal cases holding this rule, and continues: "It is quite remarkable, however, that notwithstanding the formidable array of authority in its favor, the courts of this state have never sustained this doctrine by any adjudication, but on the contrary the great weight of judicial opinion, and the views of some of our most distinguished jurists, are

¹⁷¹ *Needham v. Thayer*, 147 Mass. 536, 18 N. E. Rep. 429.

¹⁷² *Mastin v. Gray*, 19 Kans. 458, 27 Am. Rep. 149.

¹⁷³ *Dozier v. Richardson*, 25 Ga. 80.

¹⁷⁴ 70 N. Y. 253, 36 Am. Rep. 539.

directly opposed to it. As has been already stated, our courts have settled by adjudication in regard to judgments of sister states, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence, and have further decided (in opposition to the holding of courts of some of the other states) that this may be done even if it involves the contradiction of a recital in the judgment record. In stating the reasons for this conclusion, our courts have founded it on general principles, quite as applicable to domestic judgments as to others, and save in one case,¹⁷⁶ have in their opinions made no discrimination between them.¹⁷⁶ When we come to consider the effect of these authorities, it is difficult to find any solid ground upon which to rest a distinction between domestic judgments and judgments of sister states in regard to this question, for under the provisions of the Constitution of the United States, which requires that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, it is now well settled that when a judgment of a court of a sister state is duly proved in a court of this state, it is entitled here to all the effect to which it is entitled in the courts of the state where rendered. If conclusive there, it is equally conclusive in all the states of the Union; and whatever pleas would be good to a suit thereon in the state where rendered, and none others, can be pleaded in any court in the United States.¹⁷⁷ In holding, therefore, that a defense that the party was not served and did not appear, although the record stated that he did, was good, our courts must have held that such was the law of this state and the common law, and consequently that in the absence of proof of any special law to the contrary in the state where the judgment was rendered, it must be presumed to be also the law of that state. The judgments of our courts can stand on no other logical basis. The distinction which is made in almost all the other states of the Union between the effect of domestic judgments and judgments of sister states, in regard to the conclusiveness of the

¹⁷⁶ *Kerr v. Kerr*, 41 N. Y. 272.

¹⁷⁶ Citing *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]; *Starbuck v. Murray*, 5 Wend. 143 [21 Am. Dec. 172];

Noyes v. Butler, 6 Barb. 618, and cases cited.

¹⁷⁷ Citing *Hampton v. McConnell*, 8 Wheat. 234; *Story, Comm. on Cons. § 183*; *Mills v. Duryee*, 7 Cranch, 481.

presumption of jurisdiction over the person, is sought to be explained by saying that in regard to domestic judgments the party aggrieved can obtain relief by application to the court in which the judgment was rendered, or by writ of error, whereas in the case of a judgment rendered against him in another state he would be obliged to go into a foreign jurisdiction for redress, which would be a manifestly inadequate protection; and therefore the Constitution may be construed so as to apply only where the persons affected by the judgment were within the operation of the proceeding. This explanation, however, does not remove the difficulty in making the distinction; for if there is a conclusive presumption that there was jurisdiction, that presumption must exist as well in one case as in the other. The question whether or not the party is estopped cannot be made to depend upon the greater inconvenience of getting rid of the estoppel in one case than in another. But aside from this observation as to the effect of the authorities, an examination of them shows that our courts did in fact proceed upon a ground common to both classes of judgments." The learned judge here proceeds to examine the New York authorities at some length, citing and quoting from those mentioned in the margin.¹⁷⁸ The pith of the argument extracted from them (and which is truly as applicable to one class of judgments as to the other) is that, to say that the paper relied on is a record because it recites the defendant's appearance, and that he cannot deny the jurisdiction over him because the paper is a record, is reasoning in a vicious circle; and that unless a court has jurisdiction, it can never make a record, such as to import absolute verity, and the party ought not to be estopped, by any allegation in a supposed record, from proving any fact which goes to establish the truth of a plea alleging want of jurisdiction. The conclusion of the learned judge's investigation is as follows: "In *Bolton v. Jacks*, 6 Rob. 198, Jones, J., says that it

¹⁷⁸ *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 173; *Bigelow v. Stearns*, 19 Johns. 41, 10 Am. Dec. 189; *Latham v. Edgerton*, 9 Cow. 227; *Davis v. Packard*, 6 Wend. 837; *Bloom v. Burdick*, 1 Hill, 180; *People v. Cassels*, 5 Hill, 164; *Harrington v. People*, 6 Barb. 607; *Noyes*

v. Butler, 6 Barb. 618; *Hard v. Shipman*, 6 Barb. 621; *Wright v. Douglass*, 10 Barb. 97; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Adams v. Saratoga & W. R. Co.*, 10 N. Y. 328; *Pendleton v. Weed*, 17 N. Y. 75; *Porter v. Bronson*, 29 How. Pr. 292.

is now conceded, at least in this state, that want of jurisdiction will render void the judgment of any court, whether it be of superior or inferior, of general, limited, or local jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the truth of the fact recited, and a party against whom a judgment is offered is not by the bare fact of such recitals estopped from showing by affirmative proof that they were untrue and thus rendering the judgment void for want of jurisdiction. It thus appears that the current of judicial opinion in this state is very strong and uniform in favor of the proposition stated by Jones, J., in 6 Rob. 198, and if adopted here is decisive of the present case. It has not as yet, however, been directly adjudicated, and if sustained it must rest upon the local law of this state, as it finds no support in adjudications elsewhere. There are reasons, however, founded upon our system of practice, which would warrant us in so holding. The powers of a court of equity being vested in our courts of law, and equitable defenses being allowable, there is no reason why, to an action upon a judgment, the defendant should not be permitted to set up, by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded in those states where the record is held conclusive, that when the judgment has been obtained by fraud, or without bringing the defendant into court, and the want of jurisdiction does not appear upon the face of the record, relief may be obtained in equity. The technical difficulty arising from the conclusiveness of the record is thus obviated." A recent case in California, without going so far as to admit that it is regular or proper practice to permit the collateral impeachment of a judgment for want of jurisdiction, yet holds that if the party *does in fact* so assail the judgment, and the result of the investigation is the discovery that it was not actually founded upon proper jurisdiction, then the nullity of the judgment must be declared, and its conclusive effects done away with, just as if it were void upon its face.¹⁷⁹

¹⁷⁹ Hill v. City Cab Co. (Cal.), 21 Pac. Rep. 723. The court, in pronouncing its opinion, said as follows: "This was an action upon the judgment of a court

§ 276. Arguments on the Conclusiveness of Records.

From an examination of the authorities cited in the preceding sections, it will be discovered that many of them have been chiefly influenced, in refusing to hear extraneous evidence on a plea of want of jurisdiction, by the traditional regard which has always been shown to judicial records. From the earliest times, the written memorials of courts have been held to import the most absolute and "uncontrollable verity." That records "always speak the truth," and cannot be contradicted, that they can be tried only by inspection, and are evidence of the highest nature, are legal commonplaces of almost legendary antiquity. Yet if we consider the present meth-

od of general jurisdiction. The defendant pleaded in defense that said judgment had been obtained without service upon him, or any authorized appearance on his behalf. The court below found these facts to be true, but rendered judgment against defendant upon the ground that he did not show that he had a meritorious defense to the original action. We think that this was error. It is true that a court of equity will not give relief against a judgment unless it be shown that the complainant had a defense upon the merits. Equity, in such case, will simply hold its hand, and leave the parties to their rights at law. It is also true that at law a defendant cannot collaterally assail a judgment unless it be void on its face. This was held after careful consideration in *Carpentier v. Oakland*, 80 Cal. 489, and the general doctrine of that case has recently been approved. *Hodgdon v. Railroad Co.*, 75 Cal. 648, 17 Pac. Rep. 928. And it is in accordance with the preponderance of authority elsewhere. See *Freem. Judgm.* (8d Ed.) § 116. In New York, where a contrary doctrine seems to prevail, it is admitted that the rule there rests upon the local law of that state, and 'finds no support in adjudications elsewhere.' *Ferguson*

v. Crawford, 70 N. Y. 267. And we do not understand that our statute has changed the rule. Section 1916 of the Code of Civil Procedure simply means that evidence is admissible to impeach the judgment in the cases allowed by law,—not in all cases whatsoever. But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law, upon such facts, we do not see why the case is not like that where a judgment is void upon its face. In the present case the findings establish the fact that there was no service of summons upon or authorized appearance by the defendant. And none of the evidence is brought up, nor does the question appear to have been raised by exception or demurrer, or in any other way. The facts, therefore, must be taken to be established by the record beyond all controversy. And upon such facts the law is that the judgment is void. *Baker v. O'Riordan*, 65 Cal. 871, 872, 4 Pac. Rep. 232; *Merced Co. v. Hicks*, 67 Cal. 109, 7 Pac. Rep. 179."

ods of perpetuating the accounts of legal proceedings—the loose, careless, and irregular manner in which records are but too often made up,—it is difficult to find satisfactory reasons, in the thing itself, for attributing such sanctity to a judgment roll. In so far then as this rule rests only upon the inviolable character of the record, it seems to evince a too superstitious reverence for the notions of the early English law. But there is a broad and very serious consideration of public policy underlying the rule, upon which the best considered cases ultimately base their position. The stability of judicial records is requisite for the peace and comfort of society, and for the protection of all persons who may deal with rights or property in reliance upon their conclusiveness. As it has been said by a certain high court, if judgments were always open to collateral attacks, they would “no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain; and a cloud would rest upon every title.”¹²⁰ Now while it may be conceded that the considerations here adduced are amply sufficient to sustain the rule against impeaching judgments collaterally for errors or irregularities, it is still a question whether they apply with equal force where the objection goes to the very jurisdiction of the court. But it must be admitted that the necessity of protecting innocent third persons, who may acquire rights or alter their legal relations on the faith of judicial records, is of grave importance.

On the other hand, the arguments for permitting want of jurisdiction to be shown collaterally, may be divided into two heads. First, there is the question of natural justice to the individual. To suffer a man to be condemned unheard, to permit him to be deprived of his property or his rights by proceedings of which he had no notice or in which he had no opportunity to be heard, is repugnant to every sentiment of fairness and right dealing, as well as wholly alien to the spirit of our jurisprudence. To sacrifice the individual to the wel-

¹²⁰ *Lancaster v. Wilson*, 27 Gratt. 629.

fare of the community is no doubt a very high principle of political ethics, but it is scarcely at home in the body of our law, except in matters of police. On the contrary, it is the guarantee which the law gives of the inviolability of every man's rights and estate that constitutes its best title to the respect and confidence of the people. True, it is said that a defendant who is injured by the rendition of a judgment against him without jurisdiction of his person, may procure its reversal in an appellate court, or move to vacate it in the court which rendered it, or go to equity with an application for an injunction. But this is no adequate safeguard. These remedies are often illusory. For it is very possible that he may remain entirely ignorant of the adjudication against him until long after his rights are irrevocably lost. In the second place, if the court had no jurisdiction, its proceedings are void; and if the action of the court was void, its memorial of that action is no record. This argument is put in a very clear light in an early New York case, where the learned judge, speaking of an alleged record, used the following language: "It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declare to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit

of that very record from disproving any one allegation contained in it. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging want of jurisdiction."¹²¹

On the whole, therefore, we must conclude that, as a matter of strict law and logic, the authorities which permit the collateral impeachment of judgments for want of jurisdiction have the better of the argument; but that the considerations of public policy which demand the conclusiveness of the record are of such importance and gravity that they will be likely always to overbalance the claims of strict legal consistency.

§ 277. No Presumption against the Record.

The general rule, as stated, is that every presumption will be indulged in favor of the records of superior courts. An important corollary to this rule is that there can be no presumption *against* the record. For if the record imports absolute verity, its recitals must be equally as conclusive when they make against the jurisdiction as when for it. If the record is silent as to jurisdictional facts, it will be aided by presumptions. But if it recites such facts, and the facts recited are not sufficient to confer jurisdiction, there can be no presumption that the recital is incorrect or incomplete.¹²² "Where

¹²¹ *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172.

¹²² *Galpin v. Page*, 18 Wall. 850, 866; *Messinger v. Kintner*, 4 Binn. 97; *Blanton v. Carroll* (Va.), 10 S. E. Rep. 329; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Dillard v. Central Virginia Iron Co.*, 82 Va. 784, 1 S. E. Rep. 124; *Pollard v. Wegener*, 13 Wis. 569. In the important case of *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, Sanderson, J., delivering the opinion, said (p. 405): "Undoubtedly if the record is silent as to what was done in respect to some material matter, we will presume that what

ought to have been done was done. If there is no proof of what was done in obtaining service in the record, we will presume that legal service was in fact made; but when the record shows what was done for the purpose of obtaining service, how can we presume that something different was in fact done? Would that not be to join issue with the record, and dispute what it says, which we have agreed cannot be done? When the record speaks at all, it must be understood to speak the truth as to the particular fact of which it speaks; for by the law of its creation it can tell

the existence of any jurisdictional fact is not affirmed upon the record in a court of superior jurisdiction, it will be presumed upon a collateral attack that the court acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared. But no presumptions in support of a judgment are allowed in opposition to any statement made in the record. If it appear that process was served in a particular mode, no other and different service can be presumed, for such presumption would contradict the record, which imports verity."¹²³ But the record must be taken as a whole. And if separate recitals of jurisdictional facts are found in different parts of it, which may reasonably stand together, they must all be considered together. And if the aggregate of information thus obtained shows jurisdiction rightly attaching, the judgment will not be void, though any one of the recitals, taken alone, would not be sufficient.¹²⁴ One other possible case remains; viz., where recitals in different parts of the record flatly contradict each other, and one would show jurisdiction and the other not. Here, since one recital *must* be false, it seems reasonable to assume the truth of that one which would support the jurisdiction. Thus in a case in Iowa, the record stated in one place

no lies, neither direct nor circumstantial. This is so not only when the record speaks in favor of the jurisdiction, but when it speaks against it. * * * Suppose, in a case of attempted personal service, the officer should return that he had served the summons upon A. B., the son of the defendant, by delivering to him personally a copy, and also a copy of the complaint, and the remainder of the record is silent upon the question of service. Could we presume, in the face of such a record, that he served it upon the defendant also? Undoubtedly not. There would be a want of jurisdiction upon the face of the record within the rule in hand; and the judgment would be declared a nullity whenever and wherever presented in support of a legal claim or right. We consider the true rule to be

that legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done but rightly done; but when the record states what was done, it will not be presumed that something different was done. If the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defendant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three."

¹²³ Hering v. Chambers, 103 Pa. St. 175; Ely v. Tallman, 14 Wis. 28.

¹²⁴ Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

that the answer was filed April 8th, and in another place that it was filed April 16th; and it was presumed, in favor of the validity of the judgment, that the former statement was the true one.¹²⁵

§ 278. Judgment Void on its Face may be Attacked collaterally.

When the record itself discloses the fact that the court had no jurisdiction of the controversy, or that jurisdiction of the person of the defendant did not attach in the particular case, the judgment is a mere nullity, and may be collaterally impeached, by any person interested, whenever and wherever it is brought in question.¹²⁶ Thus when the defendant against whom a judgment was entered had no notice, and that appears from the proceedings, the judgment is void

¹²⁵ *Conrad v. Baldwin*, 8 Iowa, 207.

¹²⁶ *Briscoe v. Stephens*, 2 Bing. 218; *Rogers v. Wood*, 2 B. & Ad. 245; *Whyte v. Rose*, 8 Q. B. 498; *Thompson v. Whitman*, 18 Wall. 457; *Lincoln v. Tower*, 2 McLean, 478; *Moore v. Edgefield*, 82 Fed. Rep. 498; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Gay v. Smith*, 38 N. H. 171; *Mercier v. Chace*, 9 Allen, 242; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 235; *Latham v. Edgerton*, 9 Cow. 227; *Gage v. Hill*, 43 Barb. 44; *Fisher v. Longnecker*, 8 Pa. St. 410; *James v. Smith*, 2 S. Car. 183; *Towns v. Springer*, 9 Ga. 180; *Central Bank v. Gibson*, 11 Ga. 453; *Parish v. Parish*, 32 Ga. 658; *Campbell v. Brown*, 6 How. (Miss.) 106; *Enos v. Smith*, 7 Sm. & Mar. 85; *McComb v. Ellett*, 8 Sm. & Mar. 505; *Richardson v. Hunter*, 23 La. Ann. 265; *Edwards v. Whited*, 29 La. Ann. 647; *Dorsey v. Kendall*, 8 Bush, 394; *Summar v. Jarrett*, 59 Tenn. 23; *North v. Moore*, 8 Kans. 143; *Evans v. Percifull*, 5 Ark. 424; *Cavanaugh v. Smith*, 84 Ind. 380; *Bannon v. People*, 1 Ill. App. 496; *Dicks v. Hatch*, 10 Iowa, 380; *Bonsall v. Issett*, 14 Iowa, 309; *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595; *McMinn v. Whelan*, 27 Cal. 300; *Murphy v. Lyons*, 19 Nebr. 689, 28 N. W. Rep. 323; *Furgeson*

v. Jones (Oreg.), 20 Pac. Rep. 842. "We think it may be regarded as settled that a judgment of any court, in a suit requiring ordinary adversary proceedings, that appears upon its face or may be shown by evidence (in a case where it may be shown) to have been rendered without jurisdiction having been acquired, by notice, of the person of the defendant, or without jurisdiction of the subject-matter, is void, and may be treated as being so when it comes in question collaterally." *Horner v. Doe*, 1 Smith (Ind.), 10. To the same effect is a recent ruling of the court in Delaware (*Frankel v. Satterfield*, 19 Atl. Rep. 898), where the following very positive language was employed: "Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction apparent upon the record, it is, in legal effect, no judgment. In legal contemplation it has never had lawful existence. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. It cannot be the basis of an exe-

on its face.¹⁸⁷ It is equally true of want of jurisdiction of the subject-matter. Orders and judgments which the court has not the power under any circumstances to make or render are null and void, and their nullity can be asserted in any collateral proceeding where they are relied on in support of a claim of right.¹⁸⁸ But it must be remarked that a want of jurisdiction seldom, if ever, appears on the face of a judgment except in the insufficiency of the jurisdictional recitals. "What do the cases mean," asks the supreme court of California, "when they speak of a want of jurisdiction appearing upon the face of the record? Do they mean a positive and direct statement to the effect that something which must have been done, in order to give the court jurisdiction, was not done? Or do they mean that a want of jurisdiction appears whenever what was done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction? If the former, they are a delusion. For we venture to say that no case can be found, or will arise hereafter, where the conditions contemplated by such a rule will be found to exist. No court has ever yet so far stultified itself as to render a judgment against a defendant, and at the same time deliberately state that it had not acquired jurisdiction over his person."¹⁸⁹ In the generality of cases, therefore, a judgment will be void on its face only where the record recites the jurisdictional facts (for if it is silent jurisdiction will be presumed), and the facts as so recited are plainly insufficient to have conferred jurisdiction.

cution, or the foundation of a valid title to property purchased at a sale thereunder. No action on the part of the plaintiff, no inaction on the part of the defendant, can invest it with any of the elements of power or of vitality. It is unavailing for any purpose. It can be taken advantage of at any time, and in any court where it is offered as a conclusive adjudication between the parties; for an inspection shows that it is not such, because the court had no power, for manifest want of jurisdiction, to make an adjudication. Such a judgment, when collaterally drawn in question, may be disre-

garded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal. This doctrine has been recognized repeatedly in actions of trespass, ejectment, debt on judgments, and other collateral proceedings, wherein such judgments have been drawn in question."

¹⁸⁷ *Farmers' L. & T. Co. v. McKlinney*, 6 McLean, 1; *Bruce v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111.

¹⁸⁸ *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

¹⁸⁹ *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 743.

§ 279. Superior Courts exercising Special Statutory Powers.

So far we have confined our attention to the presumptions of jurisdiction in the case of a superior court exercising its ordinary common law powers. It remains to speak of the exercise of peculiar statutory powers, and then of the judgments of inferior tribunals. And first, it is an established rule that when a court of general jurisdiction has special and statutory powers conferred upon it, which are wholly derived from statute, and not exercised according to the course of the common law, or are not part of its general jurisdiction, it is to be regarded as *quoad hoc* an inferior or limited court, and its judgments to be treated accordingly, that is, its jurisdiction must appear on the record and cannot be presumed.¹⁹⁰ It is said, in a New Hampshire decision, that whenever a tribunal possesses qualified and limited powers, authorizing them to act in certain specified cases only, and by special modes of proceeding, and the law has provided no mode by which these proceedings can be revised, then the proceedings may be impeached collaterally by showing that the court or magistrates have acted in a case where they have no jurisdiction, or by modes of procedure which they are not authorized to adopt.¹⁹¹ The same principle, under a slightly different aspect, is stated in a Connecticut case as follows: Where a statute confers upon a tribunal of limited and statutory jurisdiction a special power, to be exercised under particular circumstances and in a particular manner, it is indispensable to

¹⁹⁰Thatcher v. Powell, 6 Wheat. 119; Secombe v. Railroad, 28 Wall. 108; Morse v. Presly, 25 N. H. 299; Carleton v. Ins. Co., 35 N. H. 162; Huntington v. Charlotte, 15 Vt. 46; Striker v. Kelly, 7 Hill, 24; Denning v. Corwin, 11 Wend. 647; Smith v. Fowle, 12 Wend. 9; Embury v. Conner, 8 N. Y. 511, 58 Am. Dec. 325; Shivers v. Wilson, 5 Har. & J. 130, 9 Am. Dec. 487; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Foster v. Glazener, 27 Ala. 391; Mitchell v. Runkle, 25 Tex. Supp. 132; Earthman v. Jones, 2

Yerg. 498; Barry v. Patterson, 8 Humph. 318; Edmiston v. Edmiston, 2 Ohio, 251; Ludlow v. Johnson, 8 Ohio, 553, 17 Am. Dec. 609; Adams v. Jeffries, 12 Ohio, 253; Cone v. Cotton, 2 Blackf. 82; Cooper v. Sunderland, 8 Iowa, 114, 66 Am. Dec. 52; Wight v. Warner, 1 Dougl. (Mich.) 384; Northcut v. Lemery, 8 Oreg. 317; Furgeson v. Jones (Oreg.), 20 Pac. Rep. 842.

¹⁹¹Sanborn v. Fellows, 22 N. H. 473, 489.

the valid exercise of the power that such circumstances exist at the time and that the court proceed in the exact manner prescribed; and where the record of such court finds the existence of those circumstances, and that such manner of proceeding was adopted, the finding is only *prima facie* proof of those facts and they may be disproved by parol evidence.¹⁹² But the most satisfactory and reasonable statement of the rule that we have encountered in the books is expressed by the court of appeals of Virginia, in the following language: "When a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised *judicially*, that is, according to the course of the common law and proceedings in chancery, such judgment cannot be impeached collaterally. But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record."¹⁹³ But we must guard against the supposition that everything beside an ordinary adversary proceeding is of this special and statutory character. For example, a warrant of attorney to confess judgment is a familiar common-law security, and the fact that the mode of procedure, in entering judgment thereon, is regulated by a statute does not convert the proceeding into one of such a special character that the same presumptions do not obtain as in the case of any ordinary judgment.¹⁹⁴ So the proceeding by writ of *ad quod damnum* to assess damages for land taken under its charter by a turnpike company is not in derogation of the common law.¹⁹⁵ Nor does the court, in an action to collect delinquent taxes,

¹⁹² *Sears v. Terry*, 26 Conn. 273.

¹⁹⁴ *Bush v. Hanson*, 70 Ill. 480.

¹⁹³ *Pulaski Co. v. Stuart*, 28 Gratt.

¹⁹⁵ *Turnpike Co. v. Quimby*, 8 Humph.

872. And see *Harvey v. Tyler*, 2 Wall. 476.

¹⁹⁶ *Galpin v. Page*, 18 Wall. 850.

exercise its jurisdiction in a special or summary manner; its judgment therein is entitled to the same presumptions as attend its ordinary judgments.¹⁹⁶

§ 280. Summary Proceedings.

It is well settled that a judgment in a summary proceeding must show upon its face everything that is necessary to sustain the jurisdiction of the court rendering it.¹⁹⁷ Thus, in a judgment on motion against a tax-collector and his sureties, rendered by *nil dicit*, the judgment entry must show the liability of the defendants for the debt or penalty sought to be recovered, and that the facts were proved necessary to give the court jurisdiction.¹⁹⁸

§ 281. Constructive Service of Process.

Whether a proceeding in which service of process is made upon a non-resident defendant by publication of the summons, or attachment of his property, without an appearance by him, is entitled to be supported by the ordinary presumptions of the rightful acquisition of jurisdiction by superior courts, is a question of much importance, but upon which the authorities are by no means agreed. A majority of the cases hold that such proceedings are contrary to the course of the common law, are wholly dependent for their validity upon an exact compliance with the statutes authorizing them, are to be strictly scrutinized, and therefore, within the rule just stated, are not favored with any presumption unless the record does affirmatively show that everything necessary to the jurisdiction was actually and rightly done.¹⁹⁹ A very eminent judge has said that whenever "it appears from an inspection of the record of a court of general jurisdiction that the defendant, against whom a personal decree or judg-

¹⁹⁶ *Brown v. Walker*, 85 Mo. 262; *Hogan v. Smith*, 11 Mo. App. 314.

¹⁹⁷ *Crockett v. Parkison*, 3 Coldw. 219; *Haynes v. Gates*, 2 Head. 598.

¹⁹⁸ *Graham v. Reynolds*, 45 Ala. 578.

¹⁹⁹ *Galpin v. Page*, 18 Wall. 350; *Neff*

v. Pennoyer, 3 Sawy. 298; *Gray v. Larimore*, 2 Abb. U. S. 542; *Brownfield v. Dyer*, 7 Bush. 505; *Hallett v. Righters*, 18 How. Pr. 43; *Boyland v. Boyland*, 18 Ill. 552.

ment is rendered, was, at the time of the alleged seizure, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree." ²⁰⁰ But on the other hand, a number of decisions contend,—and with much show of reason,—that such a rule is arbitrary and illogical. For, say they, the court is none the less a court of general jurisdiction because in this instance the legislature prescribes a special mode for the exercise of its powers. The *process* is special and statutory, but the jurisdiction of the court depends upon the constitution or general laws. And the presumption in favor of the validity of judgments rests upon considerations of public policy, and upon the high character of the courts of record, and the fact that the judges are men learned and skilled in the law, —reasons which are not affected by the circumstance that in the cases supposed a peculiar method of executing their process is adopted. According to this view, in cases of constructive service, the record, if silent or incomplete, should be aided by the same presumptions which obtain in the case of ordinary judgments founded upon personal service. ²⁰¹

²⁰⁰ Field, J., in *Galpin v. Page*, 18 Wall. 364.

²⁰¹ *Gemmell v. Rice*, 18 Minn. 400, (Gil. 371;); *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Nash v. Church*, 10 Wis. 312; *Lawler v. White*, 27 Tex. 250. In *Stuart v. Anderson*, 70 Tex. 588, 8 S. W. Rep. 295, it is said: "It seems to us that there can be no substantial reason for holding, in the one case, that it must be affirmatively shown that such process as the law declares sufficient was properly executed, while, in the other, this will be presumed if the record does not show to the contrary. Whether the jurisdiction of a court be general or special cannot be made to depend upon the character of the process through which it acquires power over the person or thing to be affected

by its final adjudication. The constitution confers jurisdiction, but the legislature prescribes the process through which persons and things may be brought within its reach and made subject to its exercise. It seems to us illogical to hold, when the averments of the pleadings show that personal service might have been made within the jurisdiction, that this will be presumed to have been done if the record be silent, or do not show to the contrary, when the court has exercised, or assumed to exercise, the power to make a final judgment, but to hold that the same presumption will not be indulged as to proper citation by publication, or as to the seizure of property, when the pleadings show that these things were necessary to be done, and could have

§ 282. Judgments of Inferior Courts not aided by Presumptions.

In respect to the subject now under discussion, there is a fundamental distinction between superior and inferior courts. In the case of judgments rendered by the latter, the rules already stated as applying to the former are directly reversed.²⁰² Courts of inferior or limited powers must not only act within the scope of their jurisdiction, but it must appear on the face of their proceedings that they so acted; the record or minutes or papers in the case must affirmatively show the existence of every fact necessary to give jurisdiction in the particular cause; otherwise the judgment may be impeached collaterally, no presumptions are indulged in its support, and want of jurisdiction may be shown by evidence *aliunde*.²⁰³ "Where one seeks to enforce the judgment of a court of limited and special jurisdiction, its organization is open to inquiry, and its jurisdiction must be established."²⁰⁴ There are general expressions in the books which seem to indicate that, unless the jurisdiction of an inferior court appears fully and affirmatively on the record of its proceedings, the judgment will be absolutely *void*. And in that case there could be no question of introducing extraneous evidence either to support or contradict it.

been done, before the court assumed the power to render a final judgment. In either case the presumption that the court did not render a final judgment until it was authorized to do so, arises from the fact that to have done otherwise would have been a breach of duty, which is never presumed from the doing of an act that may have been legal."

²⁰² See, *supra*, §§ 270-273.

²⁰³ *Harris v. Willis*, 15 C. B. 710; *Turner v. Bank*, 4 Dall. 11; *Kemp v. Kennedy*, 5 Cranch. 173; *Crawford v. Howard*, 30 Me. 422; *Walbridge v. Hall*, 3 Vt. 114; *Nye v. Kellam*, 18 Vt. 594; *Smith v. Rice*, 11 Mass. 518; *Sayles v. Briggs*, 4 Met. 421; *Wells v. Stevens*, 2 Gray, 115; *Hendrick v. Whittemore*, 105 Mass. 23; *Henry v. Estes*, 127 Mass. 474;

Hall v. Howd, 10 Conn. 514, 27 Am. Dec. 696; *Powers v. People*, 4 Johns. 292; *Simons v. De Bare*, 4 Bosw. 547; *Wickes v. Caulk*, 5 Har. & J. 36; *Clark v. Bryan*, 16 Md. 171; *Harvey v. Huggins*, 2 Bailey, 267; *Gray v. McNeal*, 13 Ga. 424; *Rutherford v. Crawford*, 53 Ga. 138; *State v. Ely*, 43 Ala. 568; *Steen v. Steen*, 25 Miss. 518; *Horan v. Wahrenberger*, 9 Tex. 818, 58 Am. Dec. 145; *Adams v. Tiernan*, 5 Dana, 394; *Hamilton v. Burum*, 3 Yerg. 355; *State v. Gachenheimer*, 30 Ind. 63; *Newman v. Manning*, 39 Ind. 422; *State v. Berry*, 13 Iowa, 58; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Bersh v. Schneider*, 27 Mo. 101; *State v. Metzger*, 26 Mo. 65; *Chandler v. Nash*, 5 Mich. 409.

²⁰⁴ *Crawford v. Howard*, 30 Me. 422.

It has been held, in fact, that evidence extrinsic to the record cannot supply facts requisite to the jurisdiction.²⁰⁶ But while it is undoubtedly the rule that, the record of such a court being silent on the subject or defective in its showings, there is no presumption to aid it,—while we may even concede that under such circumstances it would be presumptively invalid,—there seems to be no good reason for refusing to hear proper evidence tending to show actual jurisdiction. And in some of the states the decisions are positive to the effect that jurisdictional requisites may be shown by outside evidence, except in the case of those facts which the law expressly directs the court to spread upon its records.²⁰⁶ It is further to be remarked that although a court may be an inferior or limited tribunal, yet if it has general jurisdiction of any one subject, its proceedings and judgments in respect to that subject will be sustained by the same liberal presumptions as to jurisdiction which obtain in the case of the superior courts.²⁰⁷

§ 283. Superior and Inferior Courts distinguished.

To draw a clear line of demarcation between superior and inferior courts is rendered almost impossible by the great differences in the judicial systems of the several states, as also by the fact that courts possessing similar powers are very differently regarded in different states. Practically, the question, in regard to any specific court, must be determined by the laws and decisions of the jurisdiction where it exists. But it has several times been attempted to formulate a distinction in general terms, and such expressions, though necessarily vague, may be of some assistance in prosecuting the inquiry. The United States supreme court, at an early day, observed that “the true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this,—a court which is competent by its constitution to decide

²⁰⁶ *Anderson v. Blinford*, 58 Tenn. 310.

²⁰⁷ *Moffitt v. Moffitt*, 69 Ill. 641.

²⁰⁸ *Jolley v. Foltz*, 84 Cal. 321; *Van Deuzen v. Sweet*, 51 N. Y. 331.

on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities."²⁰⁶ But this, it will be perceived, does not so much answer the question as state it in new terms. We must conclude that the difference between superior and inferior courts is one of relative rank and authority and not of intrinsic quality. Nor will the common distinction between "courts of record" and "courts not of record" aid us in framing a general rule, because a particular tribunal may be regarded in one state as a record court while an exactly similar

²⁰⁶ *Grignon v. Astor*, 2 How. 319, 341, per Baldwin, J. See also *Kemp v. Kennedy*, 5 Cranch, 185; *Hahn v. Kelly*, 84 Cal. 391. "What tests are to be applied in determining the question of inferiority? It may be solved by showing that the court is either placed under the supervisory or appellate control of those named, or that the jurisdiction conferred upon it is limited and confined. Conceding that the act in question does not place the court which it creates under the supervisory control of the circuit court, and only allows appeals and writs of error to be prosecuted directly to the supreme court, yet it will still be an inferior tribunal if its jurisdiction is limited and inferior. General jurisdiction is that which extends to a great variety of matters. Limited jurisdiction, also called specific and inferior, is that which extends only to certain specified causes." *State v. Daniels*, 66 Mo. 200.

A court of record which has, by stat-

ute, all the power that any court could have over a certain subject of jurisdiction, especially if it be a subject of jurisdiction under the general rules of law or equity, is to be regarded (as to cases within that class) as a court of superior jurisdiction, within the rule which presumes the jurisdiction of such courts to render a particular judgment. *Stahl v. Mitchell* (Minn.) 43 N. W. Rep. 385.

"A tribunal which is not a common law court, which does not proceed according to the course of the common law, a newly created, limited, and special jurisdiction from which no appeal is allowed by statute, nor writ of error by the common law, yet determining in a summary way the most important rights and franchises, both as respects the people and private persons, is and cannot be otherwise than an inferior tribunal in the strictest sense of the word." *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770.

court in another state will not possess that character. In all the states there are courts having original jurisdiction of every (or nearly every) species of action or proceeding known to the common law, unlimited in respect to the amount or the character of the controversy. And these are unquestionably "superior" courts within the meaning of the rule. And the same is true of courts possessing general equity powers. In most of the states there are certain tribunals whose authority is wholly derived from statute, who are authorized to take cognizance only of a particular class of actions or proceedings, or to act only in certain specified circumstances, whose course of procedure is precisely marked out, and whose minutes or memorials are not dignified with the character of a record. And these are undoubtedly "inferior" courts within the meaning of the rule. But between these two classes lie a considerable number of courts, whose jurisdiction has a maximum money-limit, or which have general jurisdiction of a special class of cases, or are otherwise differentiated from both the foregoing types. And as to these it is useless to attempt a universal classification. We shall proceed to ascertain how these courts are regarded in the several states.

§ 284. Probate Courts.

In Pennsylvania, the orphans' court is a court of record of equal dignity with the common law tribunals, and its decrees, as to matters within its jurisdiction, are conclusive on parties and privies against all collateral attack and impeachment except for fraud.²⁰⁹ In Ohio, the probate courts are in the fullest sense courts of record; they belong to the class whose records import absolute verity, that are competent to decide on their own jurisdiction, and to exercise it to final judgment, without setting forth the facts and evidence on which it is rendered.²¹⁰ In Missouri also, the judgments and orders of probate courts, in matters within their jurisdiction, have the same import of verity as those of courts of general jurisdiction, and, like

²⁰⁹ *McPherson v. Cunliff*, 11 Serg. & R. 422; *Musselman's Appeal*, 65 Pa. St. 485; *Lex's Appeal*, 97 Pa. St. 289.

²¹⁰ *Shroyer v. Richmond*, 16 Ohio St. 455.

them, are not to be impeached in collateral proceedings.²¹¹ And the same rule obtains in Vermont,²¹² in Alabama,²¹³ in Arkansas,²¹⁴ in Minnesota,²¹⁵ and in California.²¹⁶ In Texas, it seems to have been held at one time that the proceedings of a probate court must show every fact necessary to give jurisdiction, and could not be sustained by any presumption of validity.²¹⁷ But the latest decisions are to the effect that if the record of such a court shows that the steps necessary to clothe it with power to act in the given case were taken, or if the record be silent upon this subject, its judgment must be held conclusive in any other court of the same sovereignty when called in question collaterally.²¹⁸ On the other hand, in Mississippi, it is held that a decree of a probate court for the sale of real estate by an executor or administrator is invalid unless the record shows affirmatively a compliance with all the requirements of the statute under which the land was decreed to be sold.²¹⁹ And in Massachusetts, if a probate court exceeds its jurisdiction and makes a decree in a matter over which it has no power, the want of jurisdiction may be shown against such decree in any collateral proceeding, and it will then be treated as utterly void.²²⁰ In New York, if a surrogate's decree shows jurisdiction on its face, its recitals are presumptive evidence of its validity when the question arises in a collateral proceeding.²²¹

§ 285. Federal Courts.

The circuit, district, and territorial courts of the United States, though of limited jurisdiction, are not inferior courts in the technical

²¹¹ *Camden v. Plain*, 91 Mo. 117, 4 S. W. Rep. 86; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276.

²¹² *Doolittle v. Holton*, 28 Vt. 819, 67 Am. Dec. 745.

²¹³ *Key v. Vaughn*, 15 Ala. 497; *Arnett v. Arnett*, 83 Ala. 278; *Duckworth v. Duckworth*, 85 Ala. 70.

²¹⁴ *Osborne v. Graham*, 80 Ark. 67.

²¹⁵ *Dayton v. Mintzer*, 23 Minn. 398.

²¹⁶ *Luco v. Commercial Bank*, 70 Cal. 839, 11 Pac. Rep. 650; *McCauley v. Harvey*, 49 Cal. 497; *Kingsley v. Miller*, 45

Cal. 95; *Reynolds v. Brumagin*, 54 Cal. 254.

²¹⁷ *Easley v. McClinton*, 83 Tex. 288.

²¹⁸ *Martin v. Robinson*, 67 Tex. 368, 8 S. W. Rep. 550.

²¹⁹ *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456.

²²⁰ *Mercier v. Chace*, 9 Allen, 242; *Peters v. Peters*, 8 Cush. 529.

²²¹ *Rowe v. Parsons*, 18 N. Y. Supreme Ct. 838. See *Seymour v. Seymour*, 4 Johns. Ch. 409; *Chipman v. Montgomery*, 63 N. Y. 236.

sense of the term; their judgments and decrees stand on the same footing as those rendered by state courts of general jurisdiction, and their authority and jurisdiction are always to be presumed.²²² It is said: "The courts of the United States, though possessing a limited jurisdiction, yet, in the intendment of law, stand upon the same footing as courts of record of general jurisdiction. All the presumptions which are indulged in favor of superior tribunals of general jurisdiction are equally extended to the courts of the United States. In pleading a judgment or decree of one of those courts, there is no more necessity for showing the facts which confer jurisdiction than in a plea of a judgment of the highest tribunal known to the law. Their judgments cannot be impeached for irregularity or error in a collateral proceeding; they can only be vacated on motion, in the courts in which they are rendered, or reversed for error in an appellate jurisdiction."²²³

§ 286. Justices of the Peace.

It is not universally true that the courts of justices of the peace are inferior tribunals, within the rule in regard to presuming jurisdiction. In Texas, for example, such courts are created by the constitution, and exercise, within the limits therein defined, general exclusive jurisdiction; and accordingly their judgments, though not showing all the facts necessary to give jurisdiction, cannot be attacked collaterally as void therefor.²²⁴ And in several other states, the judgments of such magistrates are considered as entitled to all the presumptions of validity. This is the case in Connecticut,²²⁵ Vermont,²²⁶

²²² *McCormick v. Sullivan*, 10 Wheat. 192; *Ex parte Watkins*, 3 Pet. 198; *Kennedy v. Georgia State Bank*, 8 How. 611; *Page v. United States*, 11 Wall. 268; *Livingston v. Van Ingen*, 1 Paine, 48; *Ruckman v. Cowell*, 1 N. Y. 505; *Matson v. Burt*, 9 Hun. 470; *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 271; *Reed v. Vaughan*, 15 Mo. 187, 55 Am. Dec. 138; *Turrell v. Warren*, 25 Minn. 9; *Pierro v. St. Paul & N. P. R. Co.*, 37 Minn. 314, 34 N. W. Rep. 33.

²²³ *Reed v. Vaughan*, 15 Mo. 187, 55 Am. Dec. 138.

²²⁴ *Williams v. Ball*, 52 Tex. 603, 36 Am. Rep. 780; *Watkins v. Davis*, 61 Tex. 414; *Holmes v. Buckner*, 67 Tex. 107, s. c., reported as *Bryant v. Buckner*, 2 S. W. Rep. 452.

²²⁵ *Fox v. Hoyt*, 12 Conn. 491, 31 Am. Dec. 760.

²²⁶ *Wright v. Hazen*, 24 Vt. 143; *Farr v. Ladd*, 37 Vt. 158.

Pennsylvania,²²⁷ Mississippi,²²⁸ Tennessee,²²⁹ and Alabama.²³⁰ And in Massachusetts it is said that "the rule which makes the judgment of a court of record binding upon the parties, until reversed by proper proceedings therefor, although jurisdiction of the person was not properly obtained, is applicable as well to a justice of the peace as to one of a court of general jurisdiction."²³¹ But on the other hand, in Maryland, judgments rendered by justices will not be allowed to stand where the record fails to show affirmatively that a summons had been issued and served upon the defendant; such defect in the proceedings is fatal to the validity of the judgment and may be called in question in a collateral action.²³² And in Michigan a judgment entered by a justice by virtue of a statutory authority must show that the requirements of the statute have been complied with, and if it fails in this it is void.²³³

§ 287. Record of Inferior Court, showing Jurisdiction, is Conclusive.

It is important to be observed, in considering the effect of judgments rendered by inferior courts, that if the record *does* affirmatively show the facts necessary to confer jurisdiction, then the same presumptions are indulged in favor of the regularity and validity of its proceedings as are extended to the superior courts, and they cannot be collaterally impeached for errors or irregularities.²³⁴ "Once it appears that it had jurisdiction to proceed, and did proceed, the same presumptions prevail in favor of the action and record of the inferior as of the superior court, and the verity of its record, and the presumptions which support it, are alike indisputable in any collateral way."²³⁵

²²⁷ Billings v. Russell, 23 Pa. St. 189;
Clark v. McComman, 7 Watts & S. 469;
Tarbox v. Hays, 6 Watts, 398.

²²⁸ Stevens v. Mangum, 27 Miss. 481.

²²⁹ Turner v. Ireland, 11 Humph. 447.

²³⁰ Lightsey v. Harris, 20 Ala. 411.

²³¹ Hendrick v. Whittemore, 105 Mass.
28.

²³² Fahey v. Mottu, 67 Md. 250, 10 Atl.
Rep. 68.

²²⁸ Beach v. Botsford, 1 Dougl. (Mich.)
199, 40 Am. Dec. 45.

²³⁴ Comstock v. Crawford, 3 Wall. 396;
Cooper v. Sunderland, 3 Iowa, 114, 66
Am. Dec. 52; Reeves v. Townsend, 23
N. J. Law, 396; Wilson v. Wilson, 18
Ala. 176; Paul v. Hussey, 35 Me. 97;
Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec.
760; Gray v. McNeil, 12 Ga. 424.

²³⁵ Featherston v. Small, 77 Ind. 148.

Whether evidence would be heard in contradiction of the record of an inferior court on the subject of jurisdiction, where that record shows fully and affirmatively all that is necessary on the point, is a different question. Some of the authorities indicate that the jurisdiction could not be inquired into, in direct opposition to the face of the record, at least in the courts of the same state where the judgment was rendered.²³⁶ But in New York such recitals are considered to be only *prima facie* evidence and subject to be contradicted, though sufficient to uphold the proceeding if not disproved.²³⁷ In that state, however, it will be remembered, want of jurisdiction may be shown collaterally against the judgment of *any* court.²³⁸ But it appears to be undisputed that if the jurisdiction of an inferior court, in any case, depends upon the existence of a certain fact or state of facts, and it is shown by the record that there was evidence tending to prove such facts, and that such evidence was adjudged sufficient, and the court judicially determined that such facts existed, then the judgment cannot be collaterally impeached or contradicted.²³⁹

§ 238. No Presumption of Validity on Direct Attack.

"The rule that a record is conclusive evidence of its own verity is not applicable in a direct proceeding instituted for the purpose of showing its falsity as to a matter which, if false, shows that the court pronouncing it as a judgment had no jurisdiction of the person of the defendant, and consequently, that what purports to be a record is in fact no record at all."²⁴⁰ Thus, although a judgment

²³⁶ Gregory v. Bovier, 77 Cal. 121, 19 Pac. Rep. 232; Secombe v. Railroad, 23 Wall. 108.

²³⁷ Belden v. Meeker, 2 Lans. 470.

²³⁸ Ferguson v. Crawford, 70 N. Y. 253. See *supra*, § 275.

²³⁹ Sheldon v. Wright, 5 N. Y. 497; Dyckman v. New York, 5 N. Y. 434; Porter v. Purdy, 29 N. Y. 106; Bolton v. Brewster, 32 Barb. 389; Agry v. Betts, 12 Me. 415; Waterhouse v. Cousins, 40 Me. 383; Betts v. Bagley, 12 Pick. 572; Angel v. Robbins, 4 R. I. 493; Bridgeport Savings Bank v. Eldredge, 28

Conn. 556; Evansville R. Co. v. Evansville, 15 Ind. 421; Shawhan v. Loffer, 24 Iowa, 217; Bonsall v. Isett, 14 Iowa, 309; Hungerford v. Cushing, 8 Wis. 324; Kipp v. Fullerton, 4 Minn. 473 (Gil. 866); People v. Hagar, 52 Cal. 182.

²⁴⁰ Duncan v. Gerdine, 59 Miss. 550. "The distinction between cases where the validity of the record of a court of general jurisdiction is drawn in question *collaterally*, and those in which such record is *directly* impeached by writ of error or bill of review, is broad and well defined. In the one case jurie-

recites that the defendant was "duly and legally served with notice," yet, in a direct proceeding in the same court to set the judgment aside, the contrary may be shown.³⁴¹ So an officer's return of service of process may be impeached in a direct proceeding after judgment, where the return states facts which do not come within the personal knowledge of the officer.³⁴² But while jurisdiction is not presumed on a direct attack, and there is likewise no *conclusive* presumption that the record is free from irregularities or errors, yet, on appeal, error, or bill of review, it is incumbent on the party to overcome the *prima facie* correctness of the judgment. The judgment of a court of competent jurisdiction, it is said, is always presumed to be right, and a party in the appellate court alleging error in the court below must show it in the regular way in the record, or the presumption in favor of the correctness of the judgment will prevail.³⁴³ Thus the findings and judgment of a court of record will always be presumed to rest upon sufficient evidence unless the contrary be clearly shown from the record.³⁴⁴ In regard to the rule that the record imports absolute verity, an important observation is made by the New Hampshire court, to the following effect: "It is to be borne in mind that the record may be true, while the matters recorded are false, and may even be shown to be so by the record itself. Thus the record may recite that a particular plea was filed; it is conclusive evidence of that fact, but the record furnishes no evidence that the facts stated in the plea are true, for they may even in the same record be found to be false by the verdict of a jury. The allegations of parties derive no credit from their forming part of the record of a court. So far as this point is concerned, the record imports the truth of what occurred in the court and was there recorded." ³⁴⁵

diction is presumed *prima facie* unless the record disproves it, while in the other, if it is denied, its existence must be proved by the record itself." Trimble v. Longworth, 18 Ohio St. 431, 439.

³⁴¹ Newcomb v. Dewey, 27 Iowa, 381.

³⁴² McNeill v. Edie, 24 Kans. 108; Bond v. Wilson, 8 Kans. 229, 12 Am. Rep. 466; Chambers v. Bridge Manufactory, 16

Kans. 270; Hanson v. Wolcott, 19 Kans. 207.

³⁴³ Harman v. Lynchburg, 33 Gratt. 37; Wright v. Smith, 81 Va. 777; Wynn v. Heninger, 83 Va. 172; Jencks v. Smith, 1 N. Y. 90; McGirk v. Chawvin, 8 Mo. 237.

³⁴⁴ Singleton v. Boyle, 4 Nebr. 414.

³⁴⁵ Tebbetts v. Tilton, 81 N. H. 273, 286.

§ 289. Foreign Judgments.

In respect to the collateral impeachment of judgments for want of jurisdiction, there is, as we have already intimated, a radical difference between foreign judgments and such as are rendered by the courts of the state where the collateral inquiry is prosecuted. The discussion of the effect of foreign judgments belongs to another part of this work. But it may be here briefly stated that if a judgment or decree, coming from a foreign country, is regular on its face, its jurisdiction will be taken for granted unless denied, but it may always be shown by evidence that in fact the foreign court had no jurisdiction.²⁴⁶ A similar rule obtains in the case of judgments of one of the American states when called in question in the courts of another. If the judgment proceeds from a court of general powers, the jurisdiction will be presumed (so far as that the party relying on the adjudication need not plead the jurisdiction or set out the facts), but the party against whom it is offered may always deny and disprove the jurisdiction of the court rendering the judgment.²⁴⁷

PART IV. FOR FRAUD.

§ 290. Whether Parties can Impeach Judgment for Fraud.

It is an unsettled question whether a judgment may be collaterally impeached for fraud by parties or privies. There are numerous expressions in the books which have more or less relation to this point, but we shall not, in this discussion, attempt to cite all the *dicta* bearing upon the subject or attach particular weight to any but direct adjudications of the question. In a majority of the states the rule is well settled that it is *not* permissible for a party or privy to attack a judgment in a collateral proceeding on account of fraud.²⁴⁸

²⁴⁶ *Schibsy v. Westenholz*, L. R. 6 Q. B. 155; *Carleton v. Bickford*, 18 Gray, 591. And see *infra* vol. 2, §§ 818, 835-838.

²⁴⁷ *Thompson v. Whitman*, 18 Wall. 457; *Galpin v. Page*, 18 Wall. 350. And see *infra* vol. 2, §§ 897-901.

²⁴⁸ *Christmas v. Russell*, 5 Wall. 200;

The decisions are based upon the ground of the general conclusiveness of records, and the policy of the law which forbids their indirect contradiction or impeachment, and on the consideration that it is the business of a litigant to be on his guard against fraud and trickery, and that if his rights are nevertheless infringed, he has his proper remedy by action or motion to procure the annulment of the judgment or by application to equity for relief. In Pennsylvania, however, it is allowed to a party to show fraud against a judgment collaterally,³⁰⁰ and the same doctrine is apparently held in New Hampshire.³⁰⁰ This is also true in New York, although the rule in the latter state is founded rather upon the peculiarities of the code system of pleading and practice than upon general principles of law. A quotation from the most recent and important case on the subject will be found in the margin.³⁰¹ There are also decisions to the effect that where one party is allowed to offer a judgment in evidence without having pleaded it, the other ought to be allowed to impeach it by evi-

Granger v. Clark, 23 Me. 128; *Hammond v. Wilder*, 25 Vt. 842; *McRae v. Mattoon*, 13 Pick. 53; *Boston & W. R. Co. v. Sparhawk*, 1 Allen, 448; *Greene v. Greene*, 2 Gray, 361; *Williams v. Martin*, 7 Ga. 378; *Smith v. Henderson*, 25 La. Ann. 649; *Kelley v. Mize*, 3 Sneed, 58; *Anderson v. Anderson*, 8 Ohio, 109; *Webster v. Reid*, 1 Morris (Iowa), 467; *Mason v. Messenger*, 17 Iowa, 261; *Smith v. Smith*, 22 Iowa, 516; *Fleld v. Sanderson*, 34 Mo. 542.

³⁰⁰ *Hall v. Hamlin*, 2 Watts, 354; *Verner v. Carson*, 66 Pa. St. 440. But "if the party who alleges fraud in the original judgment or decree has already been heard or had an opportunity to be heard in that proceeding, upon that same fraud, he is concluded and cannot retry it in a collateral proceeding." *Otterson v. Middleton*, 102 Pa. St. 78.

³⁰⁰ *State v. Little*, 1 N. H. 257.

³⁰¹ *Mandeville v. Reynolds*, 68 N. Y. 528, 543, per Folger, J.: "The code of procedure has by its enactments taken away most, if not all, of the reasons of the rule which forbade the impeach-

ment of a judgment collaterally. Now, in an action at law, matter which was formerly of equitable cognizance solely may be set up and given in evidence. As in ejectment, where the title of the plaintiff depends upon a deed or will, it may be averred and shown in defense that it was obtained by fraud and undue influence. And so if, in an action of ejectment, the defense rests upon a deed or will, the plaintiff can make proof that it was procured by fraud or other imposition. If there was an action at law upon a judgment, could not the defendant answer in pleading and show in proof that it was procured by fraud and imposition? So then if, in an action at law on some cause of action to which a valid judgment would be a good defense, it were set up and proven, could not the plaintiff prove in reply that it was got by the fraud or collusion of the defendant and others than the plaintiff? And collusion means, by consent or agreement of the parties to it. To which should be added, in knowledge and disregard of the rights of the

dence of fraud, without being put to a direct suit to annul it, and notwithstanding it is regular upon its face.²⁸²

§ 291. Fraud in Procuring the Judgment.

In the preceding section we considered fraud in general as a ground for impeaching judgments. It is convenient, for the purposes of our further inquiry, to distinguish between fraud practiced in the procuring of the judgment and fraud as affecting the original cause of action. The former topic is illustrated by several important cases, to be now considered, as well as by many of those already cited. "The parties to an action," it is said, "cannot impeach the judgment rendered therein, in any collateral proceeding, on the ground that it was obtained through their fraud or collusion. It is their business to see that it is not so obtained. Even if, without any fault or neglect of one party, his adversary succeeded by fraud in obtaining an unjust or unauthorized judgment, he must through some prescribed mode

party impeaching the results of it. The court acts upon the matters involved in the action now in a double capacity, as a court of law and one of equity. As a court of equity it meets the question of the validity of the judgment, not as one of law but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment, but as a direct assault, which by the changing nature of the issues in the progress of the suit and trial, has become the main question in the case and legitimately before it for trial. It would be quite an abnegation of the conjoint power and jurisdiction of the court, to proceed in the case as long as the issues were of legal cognizance, and as soon as they became of equitable cognizance to turn the party over to another action, in perchance the same court, before the same judge, to have, in another trial, that matter proved and decided against the validity of the judgment, which, as the powers of the court are now in constant reciprocal activ-

ity, may as well be determined in one trial by the same tribunal. It is not merely that the same judges possess, in equal degrees, powers at law and powers in equity. It is, that the distinction between actions at law and suits in equity, and the forms of such actions are abolished, and that there is in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs. * * * The intent of the code is clear that all controversies respecting the matter involved in litigation shall be determined in one action. Whether fraud or imposition in the entry of a judicial matter of record could, before that enactment, have been set up against it collaterally at law or not, it may now be alleged against it, as an equitable defense to defeat a recovery upon it."

²⁸² *Murray v. Murray*, 6 Oreg. 17. And see *Glover v. Flowers* (N. Car.), 7 S. E. Rep. 579.

reverse or annul the judgment before he can claim to treat it as invalid."²⁵³ But it is necessary to distinguish between judgments entered by the collusion or fraud of both parties and such as are obtained by the fraud of the plaintiff. The former are void as to creditors only, not against the defendant, and may be attacked in any collateral proceeding by them, whilst the latter can be attacked by the defendant alone, directly, and in the proper court.²⁵⁴ Thus, where a party by some act or declaration out of the record lulls his opponent into a false security, or by any other means deceives him, and thereby obtains a judgment or decree to his prejudice, it is fraudulent and may be impeached upon that ground.²⁵⁵ A person against whom judgments have been obtained cannot maintain an action for damages against the parties who obtained them, the attorney who prosecuted and the officer who served the writ, for fraudulently conspiring together to injure and defraud him in those proceedings, while the judgments remain unreversed, for such action would constitute a collateral attack upon them.²⁵⁶ But on the other hand an action to recover damages for the breach of a special contract, to discontinue an action by the defendant against the plaintiff, in consequence of which the defendant had judgment in his favor and the plaintiff was compelled to satisfy an execution issued thereon, is not liable to the objection that it seeks to impeach the judgment collaterally.²⁵⁷ A composition in bankruptcy, under the federal statutes on the subject, cannot be impeached collaterally in an action at law in a state court, by a creditor who was a party to the proceedings, by showing that the composition was obtained by the fraudulent acts of the bankrupt.²⁵⁸ On principles analogous to the foregoing, it is held that, after judgment in an election contest, rendered by agreement between the claimants and giving possession to the relator, the defend-

²⁵³ *Davis v. Davis*, 61 Me. 398. See *Boston & W. R. Co. v. Sparhawk*, 1 Allen, 448. Compare *Carr v. Miner*, 42 Ill. 179.

²⁵⁴ *Meckley's Appeal*, 102 Pa. St. 536; *Dougherty's Estate*, 9 Watts & S. 189, 42 Am. Dec. 326; *Thompson's Appeal*, 57 Pa. St. 178; *Clark v. Douglass*, 63 Pa. St. 415.

²⁵⁵ *Ellis v. Kelly*, 8 Bush, 621. See *Thomas v. Ireland* (Ky.), 11 S. W. Rep. 658.

²⁵⁶ *Smith v. Abbott*, 40 Me. 442; *White v. Merritt*, 7 N. Y. 352, 57 Am. Dec. 527.

²⁵⁷ *Smith v. Palmer*, 6 Cush. 518.

²⁵⁸ *Farwell v. Raddin*, 129 Mass. 7; *Bank v. Carpenter*, 129 Mass. 1.

ant, in his answer to the relator's alternative writ of mandate demanding possession, cannot assail the judgment on the ground that, being rendered by agreement and in consideration of a sum paid to defendant, it was corrupt and fraudulent and therefore void.²⁹⁰

§ 292. Fraud in the Cause of Action.

As a general rule, fraud in the contract recovered on should be set up as a defense in the action, and therefore is no ground for subsequently impeaching the judgment.²⁹⁰ But in a Pennsylvania decision it was held that where actual fraud has been practised by a party in obtaining a deed, and the deed is used as a means of obtaining a judgment, the judgment will be void to the extent of the fraud, as to the party defrauded, although it may be valid as to other interests not involved in the fraud; and hence a collateral attack upon it, as to such fraud, is perfectly permissible; because the question of the fraudulent character of the deed had never been legally before the court and never adjudicated.²⁹¹

²⁹⁰ *Mannix v. State*, 115 Ind. 245, 17 N. E. Rep. 565. Chief Justice Niblack, in delivering the opinion of the court, said: "In the absence of an affirmative showing to the contrary, the presumption is that whatever a court has done in a proceeding of which it had jurisdiction has been correctly done. The reasonable inference from the allegations of the second paragraph of the answer, therefore, is that the judgment of the Hancock circuit court complained of was regular upon its face, and that it had been, as it purported to have been, entered by agreement of parties. Such a judgment is binding upon the parties to it until reversed upon an appeal, or until annulled or set aside by some direct proceeding instituted for that purpose. It is impervious to a collateral attack from a party to it, however corrupt or unlawful the agreement may have been which led to its rendition. It is, as

contended, a well-established rule of law that the courts will not aid in the enforcement of a corrupt or unlawful contract, but will permit the parties to remain in the relative positions in which they have placed themselves; but that rule has no application to a judgment which, by inadvertence or collusion, may have been rendered upon such a contract. Such a judgment, as regards a collateral attack upon it, stands upon the same footing with other judgments rendered in the usual course of legal proceedings, and is as binding upon the parties as any other judgment so long as it remains unreversed, and not vacated by some direct proceeding. There was consequently no error in holding the second paragraph of the answer to have been insufficient upon demurrer."

²⁹⁰ *Hatch v. Garza*, 23 Tex. 176.

²⁹¹ *Jackson v. Summerville*, 13 Pa. St. 359.

§ 293. Creditor may show Fraud in a Judgment.

However the rule may be in regard to parties and privies, it is very well settled that any third person, a stranger to the judgment, whose rights would be injuriously affected if it were allowed to stand as against him, may show, in a collateral proceeding, that it was procured through the fraudulent contrivance of the debtor or the collusion of both parties, with a design to hinder or defraud him, and so have it considered and treated as void as to him.²⁹² "A collusive judgment is open to attack whenever and wherever it may come in conflict with the rights or the interest of third persons. Fraud is not a thing that can stand, even when robed in a judgment."²⁹³ Or, as the rule is sometimes more broadly stated, a judgment which is not founded on an actual debt or other legal liability, due or enforceable at the time of its entry, will not be upheld against the creditors of the judgment debtor.²⁹⁴ Hence a judgment confessed without any consideration and with fraudulent intent, may be questioned by other judgment- and execution-creditors of the defendant, and, as to them, the judgment and execution thereon will be vacated and set aside.²⁹⁵ But a confession of judgment for the express purpose of enabling the creditor to redeem from a sale under a prior judgment is not fraudulent as against the purchaser; for the policy of the law is to encourage redemptions, in order that the

²⁹² *Duchess of Kingston's Case*, 20 How. St. Tr. 544; *Perry v. Meddowcroft*, 10 Beav. 123; *Philipson v. Egremont*, 6 Q. B. 605; *Crosby v. Lang*, 13 East, 409; *Bandon v. Becher*, 3 Cl. & Fin. 479; *Gaines v. Relf*, 13 How. 473; *Pierce v. Strickland*, 26 Me. 277; *Sidensparker v. Sidensparker*, 52 Me. 481; *Great Falls Co. v. Worster*, 45 N. H. 110; *Atkinson v. Allen*, 13 Vt. 619, 36 Am. Dec. 361; *Alexander v. Gould*, 1 Mass. 165; *Smith v. Saxton*, 6 Pick. 483; *Leonard v. Bryant*, 11 Met. 370; *Downs v. Fuller*, 2 Met. 135, 35 Am. Dec. 393; *Vose v. Morton*, 4 Cush. 27, 50 Am. Dec. 750; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 281; *Hall v. Hamlin*, 2

Watts, 354; *Mitchell v. Kintzer*, 5 Pa. St. 216, 47 Am. Dec. 408; *Caldwell v. Walters*, 18 Pa. St. 79, 55 Am. Dec. 592; *Thompson's Appeal*, 57 Pa. St. 175; *Second Nat. Bank's Appeal*, 85 Pa. St. 528; *Ordinary v. Wallace*, 2 Rich. 460; *Hammock v. McBride*, 6 Ga. 178; *Faris v. Dunham*, 5 T. B. Mon. 397, 17 Am. Dec. 77; *De Armond v. Adams*, 25 Ind. 455; *Callahan v. Griswold*, 9 Mo. 775; *Hackett v. Manlove*, 14 Cal. 85.

²⁹³ *Smith v. Cuyler*, 78 Ga. 654, 3 S. E. Rep. 406.

²⁹⁴ *Palmer v. Martindell*, 48 N. J. Eq. 90, 10 Atl. Rep. 802.

²⁹⁵ *Shallcross v. Deats*, 43 N. J. Law, 177; *Bryant v. Harding*, 29 Mo. 347.

property of the debtor may discharge as many of his liabilities as possible.²⁶⁶ For another example, in an action by a creditor to set aside a deed as fraudulent, the grantee therein may show, although his deed is fraudulent as to creditors, that the complainant's judgment was obtained by fraud and artifice practised by him upon the grantor.²⁶⁷ But inasmuch as the law always favors the stability and finality of judgments, it is held that a stranger who thus seeks to impeach a judgment as a fraud upon his rights must show the fraud by clear and satisfactory proof.²⁶⁸

§ 294. Fraud must affect the Creditors.

A very important element in the rule just stated is that the fraud alleged must be such as directly affects the party seeking to impeach the judgment. It is no ground for the intervention of third persons that fraud has been practised *upon* the debtor; it must be fraud practised *by* the debtor, either alone, or, as is more commonly the case, in collusion with the plaintiff in the judgment. For instance, upon the distribution of the proceeds of a sheriff's sale, a subsisting judgment can be attacked by other creditors collaterally only on the ground of collusion, not because it is a fraud on the debtor.²⁶⁹ "The fraud which will authorize a creditor to impeach a judgment obtained by another against his debtor must be a fraud against the creditor, not a mere overreaching of the debtor in his litigation. There must be collusion."²⁷⁰ Nor can creditors thus set up any matter of defense original or subsequent.²⁷¹ Fraudulent judgments, it is said, like fraudulent deeds, are good against all but the interests intended to be defrauded. Hence those parties whose interests are affected cannot require the court to vacate the judgment on the record, for that would have the effect to annul it as against the whole world.²⁷²

²⁶⁶ *Karnes v. Lloyd*, 52 Ill. 113.

²⁶⁷ *Faris v. Dunham*, 5 T. B. Mon. 397, 17 Am. Dec. 77.

²⁶⁸ *Clark v. Bailey*, 2 Strobh. Eq. 143; *Hulverson v. Hutchinson*, 39 Iowa, 316.

²⁶⁹ *Sheetz v. Hambest*, 81 Pa. St. 100; *Bank v. Roseberry*, 81 Pa. St. 309; *Dougherty's Estate*, 9 Watts & S. 189,

43 Am. Dec. 326; *Lewis v. Rogers*, 16 Pa. St. 18; *Thompson's Appeal*, 57 Pa. St. 175.

²⁷⁰ *McAlpine v. Sweetser*, 76 Ind. 78.

²⁷¹ *Lewis v. Rogers*, 16 Pa. St. 18; *Johns v. Pattee*, 55 Iowa, 665, 8 N. W. Rep. 668.

²⁷² *Thompson's Appeal*, 57 Pa. St. 175.

§ 295. What Creditors allowed to allege Fraud.

The privilege of impeaching a judgment collaterally for fraud is extended only to those third persons whose rights would be impaired or prejudiced if it were allowed full force and effect as against them.²⁷² In New York it is held that none but a judgment-creditor can impeach the *bona fides* of a judgment confessed by the debtor to a third person; an attaching creditor, whose attachment was levied after such confession, cannot do so.²⁷³ But later rulings in the same state have modified this doctrine so far that now, if the attaching creditor's process has been levied upon tangible property (*i. e.*, property capable of manual delivery), he is permitted to assail the good faith of a prior confessed judgment which stands in his way.* At any rate, it seems clear that the party's claim must have been in existence at the date of the judgment, otherwise it could not properly be called a fraud upon his rights. Thus a judgment of separation of property, duly rendered in favor of a wife against her husband, cannot be inquired into or attacked collaterally by a creditor of the husband whose claim had not yet arisen when the judgment was rendered.²⁷⁵ Privies, as well as parties to the judgment, are precluded, according to the majority of the decisions, from the collateral impeachment of it for fraud. But it is held that a judgment against a sheriff for his default is not so far conclusive on the sureties on his official bond but that they may attack it for fraud and collusion when it is made the basis of a suit against them.²⁷⁶

§ 296. False Testimony.

It is the unquestioned doctrine of the cases that a party to a judgment cannot impeach it collaterally on the ground that false testi-

And see *Clark v. Douglass*, 62 Pa. St. 408.

²⁷²*Spicer v. Waters*, 65 Barb. 227; *De Armond v. Adams*, 25 Ind. 455; *Hackett v. Manlove*, 14 Cal. 85.

²⁷⁴*Bentley v. Goodwin*, 38 Barb. 633. In Indiana, by statute, subsequent as well as existing creditors can collaterally impeach for fraud a judgment en-

tered on confession. *Feaster v. Woodfill*, 28 Ind. 498.

*See *Bates v. Plonsky*, 28 Hun, 112; *Bowe v. Arnold*, 81 Hun, 256; *Tannenbaum v. Rosswog*, 6 N. Y. Supp. 578.

²⁷⁵*Lewis v. Peterkin*, 39 La. Ann. 780, 2 South. Rep. 577.

²⁷⁶*Dane v. Gilmore*, 51 Me. 544; *Lowell v. Parker*, 10 Met. 315.

mony was given at the trial, on which testimony the judgment was rendered.²⁷⁷ Neither will any action lie against a witness for committing perjury, whereby the plaintiff lost a former action, because its trial would necessarily involve a re-examination of the matters controverted and determined in the former action, and would constitute an attack upon the correctness of the former adjudication.²⁷⁸ Thus, where, in a process of foreign attachment, judgment has been rendered discharging the trustee on his disclosure, the plaintiff in that process cannot maintain an action on the case against the trustee for obtaining his discharge by falsehood and fraud in his disclosure and by fraudulent collusion with the principal defendant.²⁷⁹ In an early New York case it was held that an action would not lie against a person in that state for suborning a witness to swear falsely in a cause then pending in the courts of another state, in consequence whereof a judgment was given against the defendant in such cause, contrary to the truth and justice of the case; the decision being rested by Chancellor Kent on the ground that the merits of the original cause could not be thus overhauled in a collateral proceeding.²⁸⁰ It is also held that an award, like a judgment, cannot be collaterally impeached by evidence that one party introduced false testimony.²⁸¹ Where judgments are recovered in a court of competent jurisdiction, and the defendant appeared and had an opportunity to defend, which judgments are still in full force and unreversed, he cannot maintain an action against a defendant for fraud and conspiracy in procuring such judgments against him.²⁸²

²⁷⁷ *Dilling v. Murray*, 6 Ind. 824, 68 Am. Dec. 885; *Fisk v. Miller*, 20 Tex. 579; *The Acorn*, 2 Abb. U. S. 434; *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454.

²⁷⁸ *Cunningham v. Brown*, 18 Vt. 123, 46 Am. Dec. 140; *Smith v. Lewis*, 3 Johns. 157, 3 Am. Dec. 469; *Dampart v.*

Sympson, Cro. Eliz. 520; *Eyres v. Sedgewicke*, Cro. Jac. 601.

²⁷⁹ *Lyford v. Demeritt*, 33 N. H. 234.

²⁸⁰ *Smith v. Lewis*, 3 Johns. 157, 3 Am. Dec. 469.

²⁸¹ *Woodrow v. O'Conner*, 28 Vt. 776.

²⁸² *Engstrom v. Sherburne*, 137 Mass. 153.

CHAPTER XIV.**VACATING AND OPENING JUDGMENTS.****PART I. THE POWER TO VACATE JUDGMENTS.**

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PART I. THE POWER TO VACATE JUDGMENTS.**§ 297. What Courts possess the Power.**

The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power inherent in and to be exercised by the court which rendered the judgment, and to that court and no other the application to set aside the judgment should be made.¹ It is a common law power, possessed by the court as a part of its necessary machinery for the administration of justice, and hence might be exercised without the grant of special statutory

¹ Grattan v. Matteson, 51 Iowa, 692.

authority. In many of the states, however, this power is regulated by law, either in respect to the grounds upon which it may be put in operation, the time within which it may be invoked, the manner of calling it into play, or the practice upon an occasion for its exercise. And such regulations may either enlarge or abridge its common law scope, or otherwise transform it. But still the power remains essentially inherent in the nature and constitution of the court, not derivative. The power to vacate judgments is said to be incident to all courts of record, and to be usually exercised under restraints imposed by their own rules.³ It is not commonly possessed by the inferior tribunals—courts not of record—such as the courts of magistrates or justices of the peace, though in some of the states it may be.³ But it is generally considered that probate courts have the power, upon a proper showing, to vacate an order or decree irregularly or improvidently entered.⁴ An auditor, appointed to make distribution of a fund, has no power to go behind the record and declare a particular judgment to be void and no lien, on account of any irregularity; for that would be assuming the power of the court to review its own judgments.⁵

§ 298. Legislature cannot interfere.

The power to open or vacate judgments is essentially *judicial*. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the legislature. While a statute may indeed declare what judgments shall *in future* be subject to be vacated, or when or how or for what causes, it cannot apply retrospectively to

³Kemp v. Cook, 18 Md. 180, 79 Am. Dec. 681.

⁴See Frazier v. Griffie, 8 Md. 50; Rhodes v. De Bow, 5 Iowa, 260. In Pennsylvania, the court of common pleas has no power to open a judgment entered on a transcript of a judgment by a justice of the peace, filed in the court for purposes of lien, and let the defendant in to a defense. For all purposes except lien the judgment still re-

mains before the justice and there only can it be attacked. One court cannot overhaul a judgment while it remains within the jurisdiction of the court which rendered it. Boyd v. Miller, 52 Pa. St. 431; Lacock v. White, 19 Pa. St. 495.

⁵Hamberlin v. Terry, 1 Sm. & Mar. Ch. 589; *In re Marquis*, 85 Mo. 615.

⁶Edwards's Appeal, 66 Pa. St. 89.

judgment already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant; and second, because it would be an unwarranted invasion of the province of the judicial department. It is therefore held by a majority of the decisions that a statute vacating, or directing the courts to vacate, a particular judgment or class of judgments, already rendered and become final before the enactment of the statute, and granting new trials in such actions, is unconstitutional and invalid.⁶ A contrary rule obtains, however, in the state of Alabama.⁷ And in Georgia, it is said that the power of the legislature to pass acts allowing the opening of existing judgments, and new trials thereunder, should be confined to allowing cross-actions, equitable defenses, and rights which have accrued since the judgment, to be set up; and that it does not extend to matters which were or by law should have been heard before the court by which the judgment was rendered.⁸ At an early period, the supreme court of Pennsylvania ruled that a statute directing a particular judgment to be opened, and the defendant let in to a defense upon the plea of payment, was remedial in its character, and though the power thus exercised was partly judicial, it was not in violation of the constitution.⁹ But this doctrine, so inconsistent with the rights and independence of the judiciary, and so subversive of the fundamentals of constitutional law, was afterwards vigorously repudiated by the same court, when it felt itself better able to withstand the encroachments of the legislative body.¹⁰ As remarked by Chief Justice Gibson: "It is not more

⁶ *Merrill v. Sherburne*, 1 N. H. 199; *Lewis v. Webb*, 3 Me. 326; *Bates v. Kimball*, 2 Chip. 77; *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Taylor v. Place*, 4 R. I. 324; *Miller v. State*, 8 Gill, 145; *Ratcliffe v. Anderson*, 31 Gratt. 105; *Griffin v. Cunningham*, 20 Gratt. 31; *Weaver v. Lapsley*, 43 Ala. 224; *Lanier v. Gallatas*, 18 La. Ann. 175; *Beebe v. State*, 6 Ind. 515; *Davis v. Menasha*, 21 Wis. 491; *Arnold v. Kelley*, 5 W. Va. 446;

Burch v. Newbury, 10 N. Y. 374; *Hill v. Sunderland*, 3 Vt. 567; *Cooley, Const. Lim.* 94; *Black, Const. Prohib.* §§ 146, 197.

⁷ *Ex parte Bibb*, 44 Ala. 140.

⁸ *White v. Herndon*, 40 Ga. 493; *Bonner v. Martin*, *Id.* 501; *Kite v. Lumpkin*, *Id.* 506.

⁹ *Braddee v. Brownfield*, 2 Watts & S. 271.

¹⁰ For the history of this change of

intolerable in principle to pronounce an arbitrary judgment against a suitor, than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another contest."¹¹

PART II. THE METHOD OF SEEKING RELIEF.

§ 299. By *Audita Querela*.

Audita querela is the name of a writ constituting the initial process in an action brought by a judgment-defendant to obtain relief against the consequences of the judgment, on account of some matter of defense or discharge arising since its rendition, and which could not be taken advantage of otherwise.¹² It is a regular suit with its usual incidents, pleadings, issues of law and fact, trial, judgment, and error.¹³ The writ must be directed to the court which rendered the judgment and retains the record,¹⁴ and all the parties to the judgment against which relief is sought must join in the writ or be duly and regularly served.¹⁵ Upon the inquiry under the writ of *audita querela*, the record of the judgment is not conclusive by way of estoppel (the attack upon it being direct and not collateral), and hence the truth and justice of the whole matter is open to examination.¹⁶ The judgment in this action cannot properly include affirmative relief to the defendant.¹⁷ An appeal or writ of error will lie from it.¹⁸ In regard to the grounds on which *audita querela* may be brought, it must be observed that this is a remedial process which bears solely upon the wrongful acts of the opposite party, and not upon the

attitude, see remarks of Sharswood, J., in *Grim v. School District*, 57 Pa. St. 426.

¹¹ *De Chastellux v. Fairchild*, 15 Pa. St. 18.

¹² 1 Am. & Eng. Encyclo. of Law, 1005.

¹³ *Brooks v. Hunt*, 17 Johns. 484.

¹⁴ *Harper v. Kean*, 11 Serg. & R. 299; *Poultney v. Treasurer*, 25 Vt. 168; *Warner v. Crane*, 16 Vt. 79.

¹⁵ *Melton v. Howard*, 7 How. (Miss.)

108; *Herrick v. Bank*, 1 Williams (Vt.) 584; *Gleason v. Peck*, 12 Vt. 56; *Tittlemore v. Wainwright*, 16 Vt. 173; *Starbird v. Moore*, 21 Vt. 529.

¹⁶ *Folsom v. Connor*, 49 Vt. 4; *Paddleford v. Bancroft*, 22 Vt. 529; *Hill v. Warren*, 54 Vt. 78.

¹⁷ *Foss v. Witham*, 9 Allen, 572.

¹⁸ *Fitch v. Scovel*, 1 Root, 56; *White v. Clapp*, 8 Allen, 283; *Gordonier v. Billings*, 77 Pa. St. 498.

erroneous judgments or acts of the court; it is a writ in which the plaintiff sounds in tort.¹⁹ Hence injury, actual or apprehended, is essential to the right to bring this writ. If the matter complained of is simply nugatory and void, the party can have no need of this process.²⁰ It will lie to vacate a judgment rendered against a non-resident defendant on constructive service of process, where the statutory prerequisites were omitted.²¹ But not where an attorney, although without authority, has entered an appearance for such defendant.²² It will also lie to procure the setting aside of a judgment which was irregularly entered after a discontinuance, or taken in violation of an agreement for a continuance;²³ or which was given against an infant who was not represented by his guardian;²⁴ or against a lunatic under similar circumstances.²⁵ So when a foreign judgment against the defendant has been reversed by the foreign appellate tribunal, but in the meantime he has been sued here on that judgment, he may have relief by *audita querela*.²⁶ This writ may also be brought when the debtor has been discharged in bankruptcy subsequent to the judgment;²⁷ or to set aside a judgment from which an appeal was wrongfully denied by the inferior court.²⁸ So where two suits are brought at the same time for the same cause of action, and proceed *pari passu* to judgment and execution, a satisfaction of either judgment may be shown, upon *audita querela*, in discharge of the other.²⁹ But on the other hand, the writ of *audita querela* will not lie in any case where the defendant had a legal opportunity to avail himself, before judgment, of the same matters

¹⁹ Little v. Cook, 1 Aik. 863; Lovejoy v. Webber, 10 Mass. 108; Brackett v. Winslow, 17 Mass. 159.

²⁰ Bryant v. Johnson, 24 Me. 804.

²¹ Folan v. Folan, 59 Me. 566; Dingman v. Myers, 13 Gray, 1; Marvin v. Wilkins, 1 Aik. 107; Alexander v. Abbott, 21 Vt. 476; Whitney v. Silver, 23 Vt. 634; Eastman v. Waterman, 26 Vt. 494; Harmon v. Martin, 52 Vt. 255.

²² Spaulding v. Swift, 18 Vt. 214.

²³ Crawford v. Cheney, 13 Vt. 567; Pike v. Hill, 15 Vt. 183; Paddleford v. Bancroft, 23 Vt. 529; Hawley v. Mead,

53 Vt. 343; Kimball v. Randall, 56 Vt. 553.

²⁴ Judd v. Downing, Brayt. 27; Starbird v. Moore, 21 Vt. 529. See Barber v. Graves, 18 Vt. 290.

²⁵ Lincoln v. Flint, 18 Vt. 247.

²⁶ Merchants' Ins. Co. v. De Wolf, 33 Pa. St. 45.

²⁷ Petit v. Seaman, 2 Root, 178; Williams v. Butcher, 1 Week. Notes Cas. 304; Baker v. Judges, 4 Johns. 191.

²⁸ Edwards v. Osgood, 33 Vt. 234; Harriman v. Swift, 31 Vt. 385.

²⁹ Browne v. Joy, 9 Johns. 231.

which he now sets up, or where his own negligence has brought about the injury complained of.³⁰ Nor can it be brought where the matter alleged would be a proper subject for a writ of error;³¹ nor in respect to matters which constitute an equitable defense, not cognizable at law;³² nor for irregularities which do not affect the substantial validity of the process in the action or the merits of the controversy;³³ nor on account of an erroneous taxation of costs or allowance of excessive interest.³⁴ In a majority of the states, the proceeding by *audita querela* has fallen into complete disuse, being superseded by the more summary method of applying for relief by motion, upon notice.³⁵ For, as a general rule, wherever this writ would lie at common law, the courts may now relieve on motion.³⁶ In two states, however,—Vermont and Massachusetts,—the writ of *audita querela* is still in use, and is applied to a great variety of purposes, as will appear from the cases cited in this section.

§ 300. By Error Coram Nobis.

Another common law method of obtaining relief against a judgment in the court which rendered it was by writ of error *coram nobis*. This writ was so called from the technical words, which recited that error was alleged to exist in a certain record remaining "before us," that is, before the court which had pronounced the judgment. It lay for the

³⁰ *Avery v. United States*, 12 Wall. 304; *Lovejoy v. Webber*, 10 Mass. 101; *Barker v. Walsh*, 14 Allen, 175; *Faxon v. Baxter*, 11 Cush. 85; *Barrett v. Vaughan*, 6 Vt. 243; *Griswold v. Rutland*, 23 Vt. 324.

³¹ *Weeks v. Lawrence*, 1 Vt. 433; *Dodge v. Hubbell*, 1 Vt. 491; *School Distr. v. Rood*, 1 Williams (Vt.) 214; *Sutton v. Tyrrell*, 10 Vt. 87. Nor does it change the rule that the writ of error is taken away by statute. *Tuttle v. Burlington*, Brayt. 27; *Dodge v. Hubbell*, 1 Vt. 491; *Spear v. Flint*, 17 Vt. 497.

³² *Schott v. McFarland*, 1 Phila. (Pa.) 58; *Garfield v. University*, 10 Vt. 536.

³³ *Sawyer v. Doane*, 19 Vt. 598; *Lamp-*

son v. Bradley, 42 Vt. 165; *Ball v. Sleeper*, 28 Vt. 573.

³⁴ *Johnson v. Roberts*, 58 Vt. 599, 2 Atl. Rep. 482; *Goodrich v. Willard*, 11 Gray, 880; *Clough v. Brown*, 38 Vt. 179.

³⁵ *Job v. Walker*, 8 Md. 129; *Huston v. Ditto*, 20 Md. 305; *Smock v. Dade*, 5 Rand. (Va.) 639; *Longworth v. Screven*, 2 Hill (S. Car.), 298; *Dunlap v. Clements*, 18 Ala. 778; *Chambers v. Neal*, 13 B. Mon. 256; *Marsh v. Haywood*, 6 Humph. 210; *McMillan v. Baker*, 20 Kans. 50; *McDonald v. Falvey*, 18 Wis. 571.

³⁶ *Share v. Becker*, 8 Serg. & R. 239; *Witherow v. Keller*, 11 Serg. & R. 274; *Baker v. Judges*, 4 Johns. 191.

correction of an error of fact (not an error of law) in respect to a matter affecting the validity and regularity of the proceedings, such as the death of one of the parties at the beginning of the suit, or the infancy, insanity, or coverture of the defendant, and which was not brought into the issue.³⁷ But if the court was fully informed of and rightly apprehended the facts in the case, its error in applying the law to such facts is not such an error as could be rectified in this proceeding. Nor will this writ lie to contradict or put in issue any fact that has been already adjudicated in the action. Thus, if the record states that the defendant appeared and confessed judgment, he cannot controvert that fact after the expiration of the term for the purpose of setting aside the judgment.³⁸ The writ of error *coram nobis*, like the proceeding by *audita querela*, has now fallen into practical desuetude, being almost entirely superseded by the more speedy and efficacious remedy by motion in the same court.³⁹ In any case, the writ will not lie after affirmance of the judgment in the appellate court.⁴⁰

§ 301. By Bill of Review.

In those jurisdictions where the ancient forms of chancery pleading and practice remain in force, unmodified by statutes, the only proper method of obtaining the vacation or annulment of a decree in equity, after the term, is by bill of review. And this species of bill lies in cases of error apparent on the face of the record, for fraud, and on account of matters subsequent to the decree and which could not have been urged in defense.⁴¹ But the rule that a decree once enrolled cannot be opened except by a bill of review, or by an original bill for fraud, "is subject to well founded exceptions, arising in cases

³⁷ *Kemp v. Cook*, 18 Md. 180, 79 Am. Dec. 681; *Mississippi &c. R. Co. v. Wynne*, 42 Miss. 815; *Milam Co. v. Robertson*, 47 Tex. 222; *Hurst v. Fisher*, 1 Watts & S. 438; *Beall v. Powell*, 4 Ga. 525; *Day v. Hamburg*, 1 Browne (Pa.), 75; *Castelline v. Mundy*, 4 B. & Ad. 90; *Beven v. Cheshire*, 8 Dowl. 70; *King v. Jones*, 2 Ld. Raym. 1525; *Evans v. Chester*, 2 Mees. & W. 847.

³⁸ *Richardson v. Jones*, 13 Gratt. 53.

³⁹ *Pricket v. Legerwood*, 7 Pet. 144; *Sloo v. Bank*, 1 Scam. 428; *McKindley v. Buck*, 43 Ill. 488; *Life Association v. Fassett*, 102 Ill. 315; *Beaubien v. Hamilton*, 3 Scam. 213.

⁴⁰ *Lambell v. Pettyjohn*, 1 Strange. 690.

⁴¹ See *Fries v. Fries*, 1 McArthur, 291.

not heard upon the merits, and in which it is alleged that the decree was entered by mistake or surprise, or under such circumstances as shall satisfy the court, in the exercise of a sound discretion, that the decree ought to be set aside."⁴³ To a bill to vacate a decree the plaintiff in such decree is a necessary party defendant. The omission of him as a party is a fatal defect.⁴⁴

§ 302. By Direct Action.

In some of the states, instead of the somewhat summary method of vacating judgments on notice and motion, a practice prevails by which it is necessary to bring a direct action for this purpose, in the form of a regular suit, with plenary proceedings, in which the relief demanded is the annulment of the judgment complained of. In other respects the law and practice in these states, on the topic under consideration, does not differ materially from the rest. It may be remarked in passing that all the parties to the former suit must be made parties to an action to annul the judgment.⁴⁵

§ 303. By Motion.

The method of procuring the vacation of judgments which is by far the most commonly used, at the present day, is the proceeding by application to the court which rendered the judgment, in the form of a motion, with notice to the adverse party.⁴⁶ This practice, being simple, speedy, and effective, is well calculated to promote the interests of justice with the least cost and trouble to suitors. The time within which such applications must be made, the parties who may apply, the grounds upon which an application may be based,

⁴³ *Cowley v. Leonard*, 28 N. J. Eq. 467; *Smith v. Alton*, 22 N. J. Eq. 572; *Beekman v. Peck*, 3 Johns. Ch. 415; *Bennett v. Winter*, 3 Johns. Ch. 205; *Millsbaugh v. McBride*, 7 Paige, 509; *Herbert v. Rowles*, 30 Md. 271; *Erwin v. Vint*, 6 Munf. 267; *Carter v. Torrance*, 11 Ga. 654; *Kemp v. Squires*, 1

Ves. 205; *Robson v. Cranwell*, 1 Dick. 61.

⁴⁴ *Harwood v. Railroad*, 17 Wall. 78.

⁴⁵ *Haggerty v. Phillips*, 21 La. Ann. 729.

⁴⁶ See *Frazier v. Williams*, 18 Ind. 416.

and the practice in proceedings of this character, are the subjects which will engage our attention in the remaining part of this chapter.

§ 304. Indirect Vacation of Judgment.

It has been held that the entry of a second judgment, in the same action, is not a vacation of the first judgment, if there is nothing further to show that such former judgment was regularly cancelled or set aside. "When a judgment is once entered of record, it must stand as the judgment, until it is vacated, modified, or disposed of by some means provided by law; entering additional judgment entries is not one of them."⁴⁵ But on the other hand, it is said that although after a judgment has been entered up on a verdict, such judgment, strictly, should be set aside before a new trial is had, yet if, on motion, the verdict is set aside and a new trial granted and had, the judgment will be deemed to have been set aside.⁴⁶

PART III. THE TIME OF APPLYING.

§ 305. During the Term.

It is universally held that judgments are under the plenary control of the court which pronounces them during the entire term at which they are rendered or entered of record, and they may, during such term, be set aside, vacated, modified, or annulled by that court for cause shown.⁴⁸ Thus, in Kansas, it is said that "for the purpose of administering justice, the district court has a very wide and extended discretion in opening up judgments, and in setting aside or modifying

⁴⁵ Nuckolls v. Irwin, 2 Nebr. 60.

⁴⁷ Lane v. Kingsberry, 11 Mo. 402.

⁴⁸ Robinson v. Commissioners, 13 Md. 182; Rutherford v. Pope, 15 Md. 579; Townshend v. Chew, 31 Md. 247; Green v. Railroad, 11 W. Va. 685; Kelly v. High, 29 W. Va. 381, 1 S. E. Rep. 561; Fraley v. Feather, 46 N. J. Law, 429; Sagary v. Bayless, 18 Sm. & Mar. 158; Barker v. Justice, 41 Miss.

240; Pattison v. Josselyn, 43 Miss. 373; Ashley v. Hyde, 5 Ark. 100; McKnight v. Strong, 25 Ark. 212; Underwood v. Sledge, 27 Ark. 295; Ralston v. Lothain, 18 Ind. 308; Taylor v. Lusk, 9 Iowa, 444; State v. Treasurer, 43 Mo. 238; Rankin v. Lawton, 17 Mo. App. 574; Ballard v. Purcell, 1 Nevad. 342; Martin v. Skehan, 2 Colo. 614; Volland v. Wilcox, 17 Nebr. 46, 22 N. W. Rep. 71.

proceedings had before it, if it does so at the same term at which the judgment or proceedings are had, and if all the parties are present in the court, and no advantage is taken of either party."⁴⁰ And similar rules obtain, no doubt, in all or nearly all the states.

§ 306. After the Term.

It was the rule of the common law,—and it is still adhered to with more or less consistency in most of the states,—that after the expiration of the term the court loses control of its judgments rendered during that term; they become final, and the court has no longer the power to vacate or modify them or to set them aside.⁴⁰ The supreme court of the United States has stated the rule concisely in the following language: "It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors

⁴⁰ *State v. Sowders* (Kans.), 22 Pac. Rep. 425.

⁴¹ *Bronson v. Schulten*, 104 U. S. 410; *Brush v. Robbins*, 3 McLean, 486; *Bank v. Labitut*, 1 Woods, 11; *Loney v. Bailey*, 48 Md. 10; *Green v. Railroad*, 11 West Va. 685; *Ramsour v. Roper*, 7 Ired. 846; *Moore v. Hinnant*, 90 N. Car. 168; *Trustees v. Bailey*, 10 Fla. 288; *Ex parte Sims*, 44 Ala. 248; *Buchanan v. Thomson*, 70 Ala. 401; *Crothers v. Ross*, 15 Ala. 800; *Cotten v. McGehee*, 54 Miss. 621; *Merle v. Andrews*, 4 Tex. 200; *Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100; *Ragsdale v. Green*, 36 Tex. 193; *Anderson v. Anderson*, 18 B. Mon. 95; *McManama v. Garnett*, 3 Met. (Ky.) 517; *Rawdon v. Rapley*, 14 Ark. 203, 58 Am. Dec. 370; *Ashley v. Hyde*, 6 Ark. 92, 42

Am. Dec. 685; *Blair v. Russell*, 1 Smith (Ind.), 287; *Bland v. State*, 2 Ind. 606; *Morgan v. Hays*, Breese, 126, 12 Am. Dec. 147; *Lampsett v. Whitney*, 3 Scam. 170; *Cook v. Wood*, 24 Ill. 295; *Cox v. Brackett*, 41 Ill. 222; *Smith v. Wilson*, 26 Ill. 186; *Ashby v. Glasgow*, 7 Mo. 320; *Spafford v. Janesville*, 15 Wis. 474; *Gray v. Gates*, 37 Wis. 614; *Salter v. Hilgen*, 40 Wis. 368; *Suydam v. Pitcher*, 4 Cal. 280; *Bell v. Thompson*, 19 Cal. 706; *Lattimer v. Ryan*, 20 Cal. 628; *Exchange Bank v. Streeter* (Colo.), 4 Pac. Rep. 746. Upon dismissing a case for want of jurisdiction, it is error to render a judgment for costs, but such judgment cannot be vacated or expunged at a subsequent term. *Derton v. Boyd*, 21 Ark. 264.

exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision."⁵¹ And the federal circuit courts agree that they have no power to vacate or reverse their judgments or decrees, after the term, except in the cases specified in the decision of the supreme court just quoted.⁵² In California, after the adjournment of the term, the court loses all control over its decisions, unless its jurisdiction is saved by some motion or proceeding at the time, except when the summons has not been served, in which case a party may, within six months, move to set aside the judgment.⁵³ In Massachusetts, a court which by statute holds weekly terms, has no authority, on motion at one of such terms, to vacate a final judgment duly entered at a previous term.⁵⁴ In Alabama, while the general rule is followed, it is considered that if, by agreement of the parties, the court sets aside a judgment after the term and again tries the cause, the judgment afterwards entered is not void for want of jurisdiction, though the court is not bound to retry a cause even if the parties consent.⁵⁵ But in some other states it is held that, notwithstanding the agreement of parties, all the proceedings subsequent to the first judgment are *coram non judice* and void.⁵⁶ And this indeed seems the more logical position. In Wisconsin, where a judgment entered is not void but simply irregular, the court has no power to vacate it after the term at which it was entered, or if entered by the clerk in vacation, after the term next succeeding its entry.⁵⁷ The rule stated applies to decrees in equity as well as judgments at law. In general, chancery cannot open a final decree after the end of the term at which it was made, unless upon a bill of review, or bill in that nature, or bill or petition impeaching the decree for fraud.⁵⁸ But here, as we have already said,⁵⁹ an exception must be made in the case of equity causes not heard upon

⁵¹ *Bronson v. Schulten*, 104 U. S. 410.

⁵² *Allen v. Wilson*, 21 Fed. Rep. 881.

⁵³ *Shaw v. McGregor*, 8 Cal. 521; *Robb v. Robb*, 6 Cal. 21; *Bell v. Thompson*, 19 Cal. 706.

⁵⁴ *Wood v. Payea*, 188 Mass. 61.

⁵⁵ *Kidd v. McMillan*, 21 Ala. 326; *Hair v. Moody*, 9 Ala. 399.

⁵⁶ *Little Rock v. Bullock*, 6 Ark. 263; *Anderson v. Thompson*, 7 Lea, 259.

⁵⁷ *Egan v. Sengfeil*, 46 Wis. 703, 1 N. W. Rep. 467.

⁵⁸ *Brooks v. Love*, 3 Dana, 7; *Bobb v. Bobb*, 2 A. K. Marsh. 240; *McMicken v. Perin*, 18 How. 507.

⁵⁹ *Supra*, § 301.

the merits and in which the decree was entered by fraud, mistake, surprise, or other exceptional circumstances. If the rule applies to any courts it applies to all. The court of last resort in a state cannot set aside a judgment or decree rendered by it, after the expiration of the term at which it was rendered, unless the same is void on its face.⁸⁰

Thus it will be seen that in many of the states there is a strong disposition not to depart widely from the common law rule on this point. The reasons of the rule are obvious and weighty. The interests of the individual as well as of the community demand that there should be a definitive end of every litigation; and nothing could be more impolitic than to leave it in the discretion of every court to revise and review and reconsider its judgments without limit. Yet it is very necessary to observe that this rule does not by any means obtain in all its rigor in every state and jurisdiction. The practice varies so much from state to state that it is most difficult to formulate general principles. But we shall find, in the first place, that the rule is almost everywhere subject to certain well-recognized exceptions; as where the judgment in question is entirely void, or was entered without the authority of the court, or is vitiated by some substantial irregularity. These instances will be discussed in succeeding sections under their appropriate titles. In the second place, it will be discovered that in some few states the rule is not observed at all, the courts exercising the power to vacate or open judgments in proper cases, without any limitation as to time.⁸¹ Finally, in a considerable number of states, the statutes both prescribe the grounds on which judgments may be vacated and fix an arbitrary limit, usually six months or a year, within which the application may be made.

§ 307. Void Judgments.

It was intimated in the last section that a judgment which is entirely void may always be set aside at a subsequent term. And this is the general doctrine of the cases. Every court possesses inherent

⁸⁰ *Donnell v. Hamilton*, 77 Ala. 610.

⁸⁶; *Capen v. Inhabitants of Stoughton*,

⁸¹ See *Breden v. Gilliland*, 67 Pa. St.

16 Gray, 365.

power to vacate entries in its record of judgments, decrees, or orders rendered or made *without jurisdiction*, either during the term at which the entries are made or after its expiration.⁶³ But in Wisconsin a final judgment in the court of last resort cannot be vacated after a year from its rendition on the ground that the court had no jurisdiction of the subject-matter.⁶⁴ And in another state it is held that to authorize the setting aside of a void judgment after the expiration of the term, the invalidity of the judgment must appear on the face of the record, and not from matter outside of it, except in cases of fraud, and where the judgment was rendered after the death of a party.⁶⁵ But it is not believed that this last rule would be insisted on in all jurisdictions, since, on a motion to vacate a judgment, the impeachment of the record is direct and not collateral.

§ 308. Interlocutory Judgments.

An interlocutory judgment or decree, made in the progress of a cause, is always under the control of the court until the final decision of the suit, and it may be modified or rescinded, upon sufficient grounds shown, at any time before final judgment, though it be after the term in which the interlocutory sentence was given.⁶⁶ And in some states it is held that mere office judgments (such as are entered of course) are under the control of the court in succeeding terms and can be modified or set aside on cause shown, even after judgment has been perfected; but it is within the discretion of the courts and their decision cannot be appealed from.⁶⁷ And it seems that a mere naked default, on which no judgment or decree has ever been entered, may be set aside at any time on proper grounds; in this case the discretion of the court is not limited as to time.⁶⁷ In California, a motion to vacate a default entered by the clerk may be made at any time

⁶³ Ladd v. Mason, 10 Oreg. 308; Bruce v. Strickland, 47 Ala. 192; Baker v. Barclift, 76 Ala. 414; *In re* College Street, 11 R. I. 472.

⁶⁴ State v. Bank, 20 Wis. 640.

⁶⁵ Pettus v. McClanahan, 52 Ala. 55.

⁶⁶ Miller v. Justice, 86 N. Car. 26; Davis v. Roberts, 1 Sm. & Mar. Ch. 543.

⁶⁷ Powell v. Jopling, 2 Jones (N. Car.) 400; Wilson v. Tarbert, 3 Stew. (Ala.) 296, 21 Am. Dec. 687.

⁶⁷ Ordway v. Suchard, 31 Iowa, 487; Simmons v. Church, 31 Iowa, 284; Harper v. Drake, 14 Iowa, 583.

before final judgment is entered, although the court may have adjourned for the term at which the default was entered before the motion is made.⁶⁶

§ 309. Pennsylvania Practice.

In the state of Pennsylvania the practice in regard to opening judgments has been developed by a long line of cases, and has settled in a form different from that found in most other jurisdictions. In the language of Judge Sharswood: "Every court has power to open a judgment in order to give the parties a hearing or trial. In the case of judgments by confession or default, there is no limit of time to the exercise of this power, but in the case of judgments entered adversely after a hearing or trial, it is settled that it must be done before the end of the term at which they are entered."⁶⁷ And a judgment may be opened, for proper cause, notwithstanding it may have been several times revived by *scire facias*. "If the original judgment was obtained by fraud and misrepresentation, and the subsequent revivals were but a continuation of such fraud and misrepresentation, it is difficult to see how such revivals could add anything to the validity of the original judgment."⁷⁰

§ 310. Judgment carried over the Term by Motion.

Whatever abridges or suspends the final character of a judgment will save it from the operation of the rule under consideration. A motion to vacate a judgment, made at the same term at which the judgment was rendered and continued to a subsequent term, may be allowed at such subsequent term.⁷¹ But it is held that leave granted

⁶⁶ Willson v. Cleaveland, 30 Cal. 193.

⁶⁷ King v. Brooks, 72 Pa. St. 364. A somewhat similar practice obtains in Illinois, where it is said that courts of law exercise an equitable jurisdiction over judgments entered by confession, accompanied by warrants of attorney, and it will be exercised liberally in proper cases. Such judgments are oft-

en opened for the purpose of letting in a defense the party was precluded by accident, fraud, or otherwise, from making at the proper time, whilst the judgment itself is not vacated until the merits are determined in favor of the defendant. Hall v. Jones, 82 Ill. 38.

⁷⁰ Monroe v. Monroe, 98 Pa. St. 520.

⁷¹ Windett v. Hamilton, 52 Ill. 180;

at the term in which the judgment is entered, to move in the next term to set it aside, is irregular and void.⁷² So where a judgment is entered by default against two joint defendants, and at the same time the cause is removed to the federal court on motion of a third defendant, after it is determined that the removal was erroneous and the cause is sent back to the state court, the latter court has the power at the first term thereafter, on plaintiff's motion, to strike off the judgment, although a term had intervened after it was entered; the rule (in Illinois) that a judgment may be set aside or amended only at the same or the next term after its entry not applying while the cause is pending in the federal court.⁷³

§ 811. Under Statutes.

In many of the states, statutes have been enacted which provide that the court may, in its discretion, relieve a party from a judgment taken against him, on certain enumerated grounds, within a prescribed time from the rendition of the judgment, usually six months or a year, or in some jurisdictions two years, or within a similar period from notice of the judgment.⁷⁴ Our chief interest in these statutes is in connection with the causes which they specify as sufficient to warrant the vacation of the judgment, and in this regard they will be fully considered hereafter. But there are certain observations to be made on the time limit which they establish. In the first place, it appears that the two elements, the specified causes and the time limit, are mutually dependent. That is, if the application is based upon a ground *not* enumerated in the statute, but otherwise recognized as sufficient, it is not necessary that it be made within the statutory time.⁷⁵ Again, while unexcused delay will generally tell against an application of this sort, it is considered

Green v. Railroad, 11 W. Va. 685. Compare Ashley v. Hyde, 6 Ark. 92, 42 Am. Dec. 685.

⁷² Hill v. St. Louis, 20 Mo. 584.

⁷³ Jansen v. Grimshaw (Ill.), 17 N. E. Rep. 850.

⁷⁴ For citations to these statutes, see

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infra, § 824. And see Carlisle v. Wilkinson, 12 Ind. 91; Hunt v. Stevens, 26 Iowa, 399; Kenedy v. Jarvis (Tex.), 1 S. W. Rep. 191; People v. Lafarge, 3 Cal. 130.

⁷⁵ Cowles v. Haynes, 69 N. Car. 406.

that laches cannot be imputed to a party who takes all the time which the statute allows him to bring his motion or application.⁷⁶ Where the statutory time begins to run from "notice" of the judgment, this is construed as meaning knowledge of the rendition of such judgment, and the notice thereof need not be in writing.⁷⁷ And where the time is limited to one year, it is held that it is not enough that a motion for relief against the judgment be made within the year, but it must be brought to a hearing within that time.⁷⁸

§ 312. Judgments against Non-Residents.

The statutes in some of the states provide that a non-resident defendant who has been constructively served by publication of summons, and against whom a judgment is given, may appear and have the judgment vacated and be admitted to defend the action, at any time within a limited period after the rendition of the judgment, which period varies, in the different states, from six months to five years.⁷⁹ And the right of a defendant so served, to be let in to a defense, is an absolute right if he brings himself within the statute; the court has no discretion in the matter, but must grant his application.⁸⁰

§ 313. Laches of Party.

Aside from cases in which the time of applying for relief from the judgment is regulated by statute, and aside from cases in which the motion can only be made at the same term, we are now to inquire how the party's application will be affected by his delay or want of

⁷⁶Independent School-District v. Schreiner, 46 Iowa, 172.

⁷⁷Butler v. Mitchell, 17 Wis. 52.

⁷⁸Knox v. Clifford, 41 Wis. 458.

⁷⁹See Kinney v. O'Bannon, 6 Bush, 692; Blanchard v. Hatch, 32 Mo. 261; Allbright v. Warkentin, 31 Kana. 443; Davis v. Davis, 24 Tex. 187; Snow v. Hawpe, 23 Tex. 168; Guy v. Ide, 6 Cal. 99; 65 Am. Dec. 490.

⁸⁰Allbright v. Warkentin, 31 Kana. 442, 2 Pac. Rep. 614. Where a non-

resident defendant upon whom there was no personal service of process, applies, under the statute, within a year after judgment, for leave to file and serve an answer, there is no presumption against him of want of proper diligence, and hence he is not required to show affirmatively that he did not have actual notice of the action so as to defend before judgment. Frankoviz v. Ireland, 35 Minn. 278, 28 N. W. Rep. 503.

diligence. And first, delay in moving to have a judgment vacated, so long as the party has *no notice* of the judgment or of the action, will not bar his right, even though innocent strangers may have taken titles in reliance on the judgment.²¹ Again, lapse of time will not affect the right to vacate a judgment on the ground that the court never had jurisdiction to enter it.²² But if the party actually knows that a judgment has been rendered against him, and the judgment is not simply and merely void, it is the undoubted rule that he must exercise reasonable diligence in procuring its vacation, and that his unexcused laches or delay, unduly protracted, will preclude him from obtaining the relief sought.²³ "In deciding upon an application to strike out a judgment after the term is past, for fraud, irregularity, deceit, or surprise, the court acts in the exercise of its quasi-equitable powers, and in every such case requires the party making the application to act in good faith and with ordinary diligence. Relief will not be granted if he has knowingly acquiesced in the judgment complained of, or has been guilty of laches or unreasonable delay in seeking his remedy."²⁴ So far the law is clear. But the moment we endeavor to ascertain *what* laches or delay will bar this right, we are involved in a sea of difficulties which invariably overflows the attempt to define "diligence" or "reasonable time." It is impossible to lay down general rules. Every case must be governed by its own facts and the decisions in the particular state. It may be profitable, however, to mention some of the principal cases in which the question has actually been decided. And to begin with the clearest,—“after the lapse of twenty years no judicial proceeding whatever ought to

²¹ *Stocking v. Hanson*, 85 Minn. 207, 28 N. W. Rep. 507.

²² *Feikert v. Wilson*, 38 Minn. 341, 37 N. W. Rep. 585.

²³ *Ryder v. Twiss*, 3 Scam. 4; *Wade v. De Leyer*, 40 N. Y. Super. Ct. 541; *Caggar v. Gardiner*, 1 How. Pr. 142; *Nichols v. Nichols*, 10 Wend. 560; *McEvers v. Markler*, 1 Johns. Cas. 248; *Bliss v. Treadway*, 1 How. Pr. 245; *De Wandelaeler v. Hagger*, 1 How. Pr. 61; *Landon v. Burke*, 33 Wis. 452; *Ammerman v. State*, 98 Ind. 165; *Reese v. Mahoney*,

21 Cal. 305; *Weeks v. Merritt*, 5 Rob. (N. Y.) 610; *Altmann v. Gabriel*, 28 Minn. 132, 9 N. W. Rep. 633; *Sanderson v. Dox*, 6 Wis. 164; *Ætna Ins. Co. v. McCormick*, 20 Wis. 265; *Welch v. May*, 14 Wis. 200. The court will not, under ordinary circumstances, open a judgment and set aside an execution, unless the party asking relief applies immediately on receiving notice of the levy. *McQuillan v. Hunter*, 1 Phila. 49.

²⁴ *McCormick v. Hogan*, 48 Md. 404.

be set aside for irregularity."⁸⁰ In another case in the same state, where fourteen years had elapsed since the entry of judgment, and no satisfactory excuse or reason for the delay was shown, the motion was held properly denied on the ground of laches.⁸¹ It is also held that an unexplained delay of seven years,⁸² or five years,⁸³ or two years,⁸⁴ or seventeen months,⁸⁵ or one year,⁸⁶ or eleven months,⁸⁷ will be sufficient to justify the court in refusing the relief asked. Where an application to have a decree of divorce set aside was not made until the lapse of more than four years after the plaintiff had been fully informed of the alleged fraudulent decree, and no excuse was shown for the delay other than that proceedings to review the decree had been instituted, and an action brought to set it aside in another court, it was held that the plaintiff's right was barred.⁸⁸ On the other hand, it is held in Pennsylvania that a nonsuit may properly be taken off even three years after its entry, where cause for its removal appears; such action lies within the sound discretion of the court, and is not reviewable by writ of error.⁸⁹ The case is slightly different where a judgment has been irregularly entered against an infant. The question here is, what time should reasonably be allowed to him, after he comes of age, in which to take proceedings against the judgment. It has been held that six years is an undue delay.⁹⁰ And in a New York case it was said that there must be a limitation to the time when such a motion could be made, and the old limitation of two years, after attaining his majority, was sufficiently liberal and would prevail.⁹¹ In California, it is considered that ten days after a judgment is entered in the superior court, which has no terms, is a reasonable time within which to move to set aside such judgment.⁹²

⁸⁰ *Thompson v. Skinner*, 7 Johns. 556.

⁸¹ *Wade v. De Leyer*, 40 N. Y. Superior Ct. 541.

⁸² *Reese v. Mahoney*, 21 Cal. 305.

⁸³ *Bostwick v. Perkins*, 4 Ga. 47.

⁸⁴ *People v. Judges*, 1 Dougl. 417; *Wygant v. Brown*, 7 N. Y. Supp. 490.

⁸⁵ *Ammerman v. State*, 98 Ind. 165.

⁸⁶ *Sanderson v. Dox*, 6 Wis. 164.

⁸⁷ *Altman v. Gabriel*, 28 Minn. 182, 9 N. W. Rep. 633.

⁸⁸ *Nicholson v. Nicholson*, 118 Ind. 181, 15 N. E. Rep. 223.

⁸⁹ *Zebley v. Storey*, 8 Week. Notes Cas. 212.

⁹⁰ *Kemp v. Cook*, 18 Md. 130.

⁹¹ *Barnes v. Gill*, 13 Abb. Pr. N. S. 169.

⁹² *In re Langan's Estate*, 74 Cal. 353, 16 Pac. Rep. 183.

PART IV. THE PARTIES WHO MAY APPLY.

§ 314. Successful Party may Apply.

The courts have power, in a proper case, to set aside a judgment at the instance of the party in whose favor it is rendered.⁹⁹ The propriety and necessity of this rule are obvious. For the plaintiff's rights may be compromised, or not adequately recognized or protected, by the judgment as it stands, and without his own fault. If there are such irregularities in the judgment that he would be prevented from reaping its fruits, or if an excusable mistake has put him upon a wrong course of proceedings, or if the fraud or trickery of the defendant has prevented him from getting the full measure of relief to which he is entitled, it is but right to vacate the judgment on his motion, and afford him the opportunity to proceed anew with a more just and satisfactory result.

§ 315. Joint Defendants.

Where a judgment is rendered against several defendants jointly, but is irregular or void as to one of them,—as for want of authority or want of jurisdiction over him,—it will be vacated on the application of that defendant.¹⁰⁰ So where an attorney confesses judgment against several partners, under an authority derived from only one, it is the duty of the others to make prompt application to the court to open the judgment.¹⁰¹ Whether, in such a case, it would be deemed necessary to vacate the judgment as to all the defendants, or only as to the moving defendant, would depend somewhat upon the nature of the cause of action, but principally upon whether or not, in the particular jurisdiction, a joint judgment is considered as an entirety,—a question which will be found fully treated in another connection.¹⁰¹

⁹⁹ *Herdic v. Woodward*, 75 Pa. St. 479; *Downing v. Still*, 48 Mo. 809.

¹⁰⁰ *St. John v. Holmes*, 20 Wend. 609, 32 Am. Dec. 603; *Franks v. Lockey*, 45 Vt. 395; *Fall v. Evans*, 20 Ind. 210.

¹⁰¹ *Cyphert v. McClune*, 22 Pa. St. 195.

¹⁰¹ *Supra*, § 211. And see *Gould v. Sternburg*, 69 Ill. 581.

§ 316. Legal Representatives of Party.

Some of the statutes on this subject provide that when a judgment by default is taken on constructive service by publication, the defendant "or any person legally representing him," (or "his legal representatives"), may apply, within a limited time, to have it opened and the case retried. Under this clause it is held that one who was not a party to the proceeding in which the judgment was rendered, and who appears in his own right, is not entitled to have the judgment set aside.¹⁰² But parties who have acquired the entire interest of a defendant in the subject-matter of an action are his "legal representatives" within the meaning of such clause, and the court may, upon such terms as may be just, relieve them from a default taken against him through their mistake, inadvertence, surprise, or excusable neglect.¹⁰³ And if a motion is made by persons other than the plaintiff, claiming to be his legal representatives, to set aside a judgment and to be substituted as plaintiffs, the parties making such motion must show a state of facts which would have supported such an application by the plaintiff in the judgment.¹⁰⁴ Without doubt the phrase above used is broad enough to include the executor or administrator of a deceased party if a proper case for his intervention should arise.

§ 317. Strangers.

As a general rule, a judgment will not be vacated or set aside at the motion of a third person, not a party to the action.¹⁰⁵ It will be remembered that such persons have the right to impeach a judgment collaterally, whenever and wherever it comes in conflict with their rights, if it was founded in fraud and collusion.¹⁰⁶ And this will generally be an adequate protection to them. But there may

¹⁰² *Parsons v. Johnson*, 66 Iowa, 455, 28 N. W. Rep. 931.

¹⁰³ *Plummer v. Brown*, 64 Cal. 429, 1 Pac. Rep. 708.

¹⁰⁴ *Couvin v. Bensley*, 48 Cal. 263.

¹⁰⁵ *Drexel's Appeal*, 6 Pa. St. 272; *In re Rowland's Estate*, 4 Clarke (Pa.),

199; *Smith v. Newbern*, 78 N. Car. 303; *Hinsdale v. Hawley*, 89 N. Car. 87; *Walton v. Walton*, 80 N. Car. 26; *Jacobs v. Burgwyn*, 68 N. Car. 196; *Packard v. Smith*, 9 Wis. 184.

¹⁰⁶ *Supra*, §§ 298-295.

be cases in which right and equity require that other creditors should have the privilege of proceeding directly for the annulment of a judgment which fraudulently abridges their own remedies. And in such instances the courts will not refuse their aid. Thus an invalid judgment by confession may be set aside at the instance of a junior judgment-creditor after notice to the plaintiff.¹⁰⁷ And if the purpose of a creditor in obtaining a judgment is not to collect his debt, but to help the debtor cover up his property, his judgment will be set aside, though it be shown that this debt was genuine.¹⁰⁸ So where a husband gives a mortgage, and suffers judgment on it, purposely, to defeat the wife of her dower, and the mortgagee has constructive notice of her rights, she may intervene and have a rule to open the judgment and let her in to defend to the extent of her dower.¹⁰⁹ It is also proper to vacate a judgment against an administrator, at the instance of the heirs, when the former's conduct has been so negligent as to leave the latter no other remedy and there is a good defense not presented by the defendant.¹¹⁰ And the proper financial officer of a municipal corporation may move to vacate a judgment against it procured by the fraud or collusion of the other officers.¹¹¹ In New York, when a judgment creditor seeks by motion to set aside a prior judgment on the ground of fraud, it is within the discretion of the trial-court whether to determine the matter on motion, or to require the creditor to bring an action, and its determination is not appealable.¹¹²

PART V. WHAT JUDGMENTS MAY BE VACATED.

§ 318. General Rule.

In general, the equitable power of the courts now under consideration is unlimited in respect to the judgments, rules, orders, and decrees upon which it may be exercised. At first sight, it might

¹⁰⁷ *Bernard v. Douglass*, 10 Iowa, 370.

¹⁰⁸ *Smith v. Schwed*, 9 Fed. Rep. 483.

¹⁰⁹ *McClurg v. Schwartz*, 87 Pa. St. 521.

¹¹⁰ *McWillie v. Martin*, 25 Ark. 556.

¹¹¹ *Lowber v. Mayor of New York*, 26 Barb. 262.

¹¹² *Beards v. Wheeler*, 76 N. Y. 212.

appear inconsistent to speak of setting aside a judgment which is a mere nullity. Yet the courts hold that even though the judgment be entirely void, the party against whom it exists has the right to have it vacated, and thus clear away any cloud that it may cast upon his right to alienate his property so long as it remains of record against him.¹¹³ The power is most commonly exercised in cases of judgments entered by default, but it is equally applicable, proper grounds being shown, to such as are rendered upon trial and verdict. Relief may be granted in this manner against judgments by confession,¹¹⁴ and against probate orders and decrees,¹¹⁵ and final settlements of administrators and trustees.¹¹⁶ Under the code practice, on a motion to vacate a judgment in an equitable action, the same rules should be applied as in case of other judgments.¹¹⁷ A rule absolute against a sheriff is not final and conclusive like a judgment between parties litigant; it may be vacated on motion at the same or a subsequent term.¹¹⁸

§ 319. Consent Judgments.

A court has power to vacate and set aside a consent judgment on the ground of fraud, mutual mistake, or surprise, but it cannot alter or correct it, except with the consent of all the parties affected by it.¹¹⁹ And where, in compromise of a claim, judgment has been rendered against the defendant with his consent, he cannot, in the absence of proof of fraud, have it vacated on the ground that he acted on the erroneous advice of counsel.¹²⁰

§ 320. Judgments in Divorce.

It was the doctrine and rule of the ecclesiastical courts in England that *sententia contra matrimonium nunquam transit in rem judicatam*.¹²¹

¹¹³ Crane v. Barry, 47 Ga. 476; Mills v. Dickson, 6 Rich. 487; Forman v. Carter, 9 Kans. 674; Hervey v. Edmunds, 68 N. Car. 243; Olney v. Boyd, 50 Ill. 453.

¹¹⁴ Hutchinson v. Ledlie, 86 Pa. St. 112.

¹¹⁵ Whitaker v. Smith, 33 Ga. 287.

¹¹⁶ Sheetz v. Kirtley, 62 Mo. 417.

¹¹⁷ Etna Ins. Co. v. McCormick, 20 Wis. 265.

¹¹⁸ Wakefield v. Moore, 65 Ga. 268.

¹¹⁹ Kerchner v. McEachern, 98 N. Car. 447; Stump v. Long, 84 N. Car. 616.

¹²⁰ Anderson v. Carr, 7 N. Y. Supp. 261.

¹²¹ 7 Co. 43b.

That is to say that a sentence or judgment against the validity of a marriage,—either annulling a merely voidable marriage, or declaring that a pretended marriage was absolutely void,—was never final, but was forever open to revision and reversal.¹²² Nevertheless this maxim was not universally assented to, for we find occasional expressions of a contrary opinion on the part of eminent ecclesiastical judges.¹²³ Now in this country, there are several cases holding that the statutes which authorize courts to open judgments or decrees within a certain time after their rendition, on proper application, where there was no other service than that by publication, or on other specified grounds, do not include decrees of divorce; proceeding generally on the theory that policy requires judgments of this character to be regarded as more stable and unassailable than any other species.¹²⁴ There are undoubtedly excellent reasons for this distinction.¹²⁵ And it has at times seemed so important to legislative

¹²² *Bowzer v. Ricketts*, 1 Hagg. Con. 218; *Morris v. Webber*, 2 Leon. 169; *Meadows v. Duchess of Kingston*, Amb. 756; *Poynter*, Mar. & Div. 157; *Shelford*, Mar. & Div. 474; 2 *Bishop*, Mar. & Div. §§ 748 *et seq.*, where all the learning on this point is collected.

¹²³ *Norton v. Seaton*, 8 Phillim. 162; *Meadowcroft v. Huguenin*, 8 Curt. 403; *Prudam v. Phillips*, 2 Amb. 768.

¹²⁴ *Parish v. Parish*, 9 Ohio St. 534; *Cox v. Cox*, 19 Ohio St. 502; *Owens v. Sims*, 8 Cold. 544; *McJunkin v. McJunkin*, 8 Ind. 30; *Woolley v. Woolley*, 12 Ind. 663; *Lewis v. Lewis*, 15 Kans. 181; *O'Connell v. O'Connell*, 10 Nebr. 390, 6 N. W. Rep. 467; *Gilruth v. Gilruth*, 20 Iowa, 225; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Moster v. Moster*, 58 Mo. 326; *Tappan v. Tappan*, 6 Ohio St. 64.

¹²⁵ "There are excellent reasons why judgments in matrimonial causes, whether of nullity or divorce, should be even more stable, certainly not less, than in others. The matrimonial status of the parties draws with and after it so many collateral rights and interests of third persons, that uncertainty and

fluctuation in it must be greatly detrimental to the public interests. And especially to an innocent person who has contracted a marriage on faith of the decree of the court, the calamity of having the decree reversed and the marriage made void is past estimation." 2 *Bishop*, Mar. & Div. § 750. "The statutory provision is nothing more than a legislative recognition of the principle of public policy, which had been repeatedly affirmed by the courts, that a judgment or decree which affects directly the status of married persons by sundering the matrimonial tie, and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society, and the happiness and well-being of those who, innocently relying upon the stability of a decree of a court of competent jurisdiction, have formed a connection with the person who, wrongfully perhaps, procured its promulgation." *Parish v. Parish*, 9 Ohio St. 537.

bodies as to cause the enactment of clauses explicitly *excepting* adjudications in divorce from the operation of such statutes, as will appear from the cases just cited. But unless such decrees are thus specifically withdrawn from the general class, it is difficult to see how they can be considered as an exception to the terms of a statute plainly extending to *all* judgments, on any right principles of interpretation.¹²⁶ And aside from legislation, the courts will generally hear motions to vacate divorce judgments on the same grounds and conditions as any other judgments, except, perhaps, that they proceed with greater caution and with more anxious care for the intervening rights of strangers. Thus, where a decree of divorce has been obtained by fraud or deceit,—as where the complainant has practised fraud or trickery to prevent the defendant from having notice of the suit, or from appearing in the action, or from answering and defending the same,—the innocent party, thus deceived, may undoubtedly obtain the opening or vacating of the decree, by making a timely and proper application and showing good cause.¹²⁷ And this is especially the case where both parties to be affected by the vacation of the judgment have been parties to the fraud.¹²⁸ So also it is well settled that a decree of divorce may be vacated which is void for want of jurisdiction in the court which rendered it.¹²⁹ But a decree will not be vacated because, since the decree, the petitioner has been made, by a change in the law, an admissible witness to testify to his own innocence.¹³⁰

¹²⁶ *Lawrence v. Lawrence*, 73 Ill. 577; *Smith v. Smith*, 20 Mo. 166.

¹²⁷ *Holmes v. Holmes*, 68 Me. 420; *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 184; *Carley v. Carley*, 7 Gray, 545; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 398; *Allen v. Maclellan*, 12 Pa. St. 328, 51 Am. Dec. 606; *Getcher v. Getcher*, 51 Md. 187; *Rawlins v. Rawlins*, 18 Fla. 845; *Whitcomb v. Whitcomb*, 46 Iowa, 487; *Rush v. Rush*, 46 Iowa, 649; *Mansfield v. Mansfield*, 26 Mo. 168; *Johnson v. Coleman*, 28 Wis. 452, 99 Am. Dec. 198; *Crouch v. Crouch*, 30 Wis. 667; *True v. True*, 6 Minn. 458

(Gil. 315); *Young v. Young*, 17 Minn. 181 (Gil. 153); *Singer v. Singer*, 41 Barb. 189.

¹²⁸ *Denton v. Denton*, 41 How. Pr. 231.

¹²⁹ *Holmes v. Holmes*, 68 Me. 420; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 398; *True v. True*, 6 Minn. 458 (Gil. 315); *Wortman v. Wortman*, 17 Abb. Pr. 66; *Allen v. Maclellan*, 12 Pa. St. 328, 51 Am. Dec. 606; *Crouch v. Crouch*, 30 Wis. 667; *Weatherbee v. Weatherbee*, 20 Wis. 499.

¹³⁰ *Holbrook v. Holbrook*, 114 Mass. 568.

PART VI. GROUNDS FOR VACATING JUDGMENTS.

§ 321. Fraud and Collusion.

The power to set aside judgments for fraud or collusion, though expressly granted by statute in many of the states, is not dependent upon legislative recognition. It is a common law power, inherent in all courts of record, and may be exercised after the expiration of the term at which the judgment was rendered, on the application of the party injured.¹²¹ In a recent California decision it is said that, when a judgment is attacked and sought to be set aside on the ground of fraud, it must appear that the fraud was practised in the very act of obtaining the judgment; for any fraud anterior to that is a defense available at law and therefore concluded by the judgment.¹²² This, however, is not a rule of universal application. For there may well be cases of fraud in the cause of action, or in the manner of procuring the instrument in suit, where the courts would not withhold relief on motion, although in such cases the complainant must show that he did not know of the fraud in time to plead it in defense and could not have discovered it by due diligence. Thus, in Louisiana, a judgment will be annulled if it is shown that the instrument on which it is based has been paid or satisfied before the institution of suit and the fact of payment concealed.¹²³ So where the defendant was tricked into signing a judgment-note, supposing it to be a simple promissory note, and judgment was then entered up on it.¹²⁴ In another case, A. brought ejectment against B., the tenant of C., and B. reported to C., whose counsel put in a demurrer and began to prepare a defense to the suit; but pending this preparation, and before argument on the demurrer, B., fraudulently and collusively with A., withdrew the demurrer. It was held proper to set

¹²¹Taylor v. Sindall, 34 Md. 38; Humphreys v. Rawn, 8 Watts, 78; Mayberry v. McClurg, 51 Mo. 256; Melick v. Bank, 53 Iowa, 94, 2 N. W. Rep. 1021; Conn v. Whiteside, 6 Humph. 47.

In re Fisher, 15 Wis. 511; Dial v. Farrow, 1 McMull. 292, 36 Am. Dec. 267.

¹²²Zellerbach v. Allenberg, 67 Cal. 296, 7 Pac. Rep. 908.

¹²³Noyes v. Loeb, 24 La. Ann. 48.

¹²⁴Anderson v. Field, 6 Ill. App. 307.

aside a judgment taken by default by A., and to admit C. to a defense.¹³⁵ So where a decree declaring that certain heirs have no interest in the property, and enjoining them from setting up title thereto, was procured by the fraudulent practices and misrepresentations of the widow, it will be set aside in equity and the rights of the heirs established, even against purchasers, if they had notice.¹³⁶ But a judgment or decree will not be declared void for fraud because there may be suspicious circumstances connected with its rendition. Fraud will not be presumed. It must be satisfactorily shown.¹³⁷ It has been said that it would require a strong case to authorize the setting aside of a judgment taken by default on the ground that the same was procured through false representations.¹³⁸ And the fact that there was usury in the original mortgage debt, on which a judgment is founded, is not alone sufficient to establish fraud which will give another creditor a right to have the judgment set aside.¹³⁹ In some states, a judgment may be vacated for fraud, accident, or mistake, unmixed with the negligence or fault of the complaining party, by decree in chancery, or in a court of law by an independent action with appropriate pleadings, but it cannot be set aside on either of those grounds on motion.¹⁴⁰ In this connection it must be remarked that, in an action to set aside a judgment on the ground of fraud, neither the judgment thus sought to be vacated, nor an order refusing to set aside a default and permit an answer in that case, can be set up as a bar to the action.¹⁴¹ The right to have a judgment set aside on the ground of fraud is one that admits of being waived, and the defendant, by his subsequent conduct, may be estopped to avail himself of it.¹⁴² In a case where one of several defendants had a good defense, and by the fraudulent device of the plaintiff was prevented from making it, and was also prevented from making his motion within the time limited by law to set aside the judgment, it

¹³⁵ *Barrett v. Graham*, 19 Cal. 632.

¹³⁶ *Hayden v. Hayden*, 46 Cal. 332.

¹³⁷ *Jones v. Brittan*, 1 Woods, 667;
Caldwell v. Fifield, 24 N. J. Law, 150.

¹³⁸ *Obermeyer v. Einstein*, 63 Mo.
341.

¹³⁹ *Mahan v. Cavender*, 77 Ga. 118.

¹⁴⁰ *Dugan v. McGlann*, 60 Ga. 858;
Syme v. Trice, 96 N. Car. 243, 1 S. E.
Rep. 480.

¹⁴¹ *States v. Cromwell* (N. Y.), 14 N. E.
Rep. 448.

¹⁴² *Schenck's Appeal*, 94 Pa. St. 87.

was held that, as against such defendant, the plaintiff was estopped to enforce the judgment.¹⁴³

§ 322. Judgment taken contrary to Agreement.

Where it is apparent that there was an honest agreement between the parties that the case should be continued, and yet the plaintiff, without notice to the defendant and in violation of the agreement, enters up a default, or proceeds to trial and procures a judgment against the defendant in his absence, this is good ground for setting aside the judgment.¹⁴⁴ So where the plaintiff has previously filed a bill in equity concerning the same matter in litigation at law, and has obtained the defendant's consent for the case at law to stand continued until the bill has been heard, but afterwards takes judgment by default while the bill is still pending.¹⁴⁵ But it is said, in Iowa, that an oral agreement between the parties to delay or postpone the trial of a cause to a day beyond that set for trial, which is not communicated to the court whose action it is to govern, will be treated with but little favor in an application by the defendant to set aside a default.¹⁴⁶ In a case where the defendant neglected to answer in season, relying on the plaintiff's promise to call at his office and "fix the matter up," it was held no abuse of discretion to set aside the judgment and let in the answer, merits being shown.¹⁴⁷

§ 323. Perjury.

Another species of fraud which the plaintiff may practice in procuring a judgment, and which will be sufficient to cause its vacation, is his own wilful perjury. "A defendant failing to defend cannot have the judgment vacated on account of any innocent mistake or want of recollection on the part of the plaintiff or other witness, nor even on account of the perjury of the other witnesses, provided the

¹⁴³ Johnson v. Unversaw, 30 Ind. 435.

¹⁴⁴ Binasse v. Barker, 18 N. J. Law, 263,
28 Am. Dec. 720; McIntosh v. Commis-
sioners, 18 Kana. 171.

¹⁴⁵ Browning v. Roane, 9 Ark. 354, 50
Am. Dec. 218.

¹⁴⁶ Dixon v. Brophey, 29 Iowa, 400.

¹⁴⁷ Stafford v. McMillan, 25 Wis. 566.

plaintiff himself is wholly guiltless. Nor can he have the judgment vacated on account of any mistake or error on the part of the court or jury, unless the record affirmatively shows such mistake or error. All such mistakes or errors each party is bound to anticipate, and to prepare for by extraordinary diligence. But no party is bound to anticipate or to suppose that the other party will commit wilful and corrupt perjury, and no party is bound to exercise extraordinary diligence in preparing to meet such perjury."¹⁴⁸ In Minnesota, a statute provides an action to set aside a judgment obtained by means of the "perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party."¹⁴⁹ But it is held that an action cannot be maintained, under this section, upon the bare allegation that, upon an issue of fact squarely made, so that each party knows what the other will attempt to prove, and where neither has a right, or is under any necessity, to depend on the other to prove the fact to be as he himself claims it, there was false or perjured testimony by the successful party or his witnesses.¹⁵⁰

§ 324. Want of Notice.

It is in general good ground for setting aside a judgment that there was no service of process on the defendant, or that the service was materially irregular or defective, provided there has been no waiver of such defects by appearance or otherwise.¹⁵¹ Thus where the return of the sheriff showed a service of the summons on Monday, but the proofs on a motion to set aside a default showed that the service was in fact made on Sunday, it was held that, although the return could not be impeached for the purpose of showing that the default was irregular, yet the fact might be proved for the purpose of excusing the default as a condition to obtaining relief.¹⁵²

¹⁴⁸ *Laithe v. McDonald*, 12 Kans. 840. See a *dictum* to the same effect in *Humphreys v. Rawn*, 8 Watts, 78.

¹⁴⁹ Genl. Stats. Minn. 1878, c. 66, § 285.

¹⁵⁰ *Hass v. Billings* (Minn.), 48 N. W. Rep. 797.

¹⁵¹ *Simcock v. Bank*, 14 Kans. 529; *Hanson v. Wolcott*, 19 Kans. 207; *Carr*

v. Bank, 16 Wis. 50; *Shuford v. Cain*, 1 Abb. U. S. 302; *Heffner v. Gunz*, 29 Minn. 108, 12 N. W. Rep. 342; *Davis v. Burt*, 7 Iowa, 56; *Smith v. Rollins*, 25 Mo. 408; *Harris v. Hardeman*, 14 How. 334; *Allen v. Rogers*, 27 Iowa, 106; *Hurlburt v. Reed*, 5 Mich. 80.

¹⁵² *Smith v. Noe*, 30 Ind. 117.

But it is held that the appearance of a party against whom a judgment has been rendered, to move that it be opened and for leave to answer, is a general appearance to the merits and waives all defects in the service of process and other proceedings preliminary to the judgment.¹⁵³ Where the *return* of process is defective in not showing a due and legal service, this will also be ground for setting aside the judgment; but the court, in a proper case, may allow the return to be amended and dismiss the motion to vacate.¹⁵⁴

§ 325. Unauthorized Appearance by Attorney.

By the English rule, where a defendant has been served with process, and an attorney without authority appears for him, the court will not interfere to set aside the proceedings, if the attorney be solvent, but will leave the defendant to his remedy by summary application against the attorney. If the attorney be insolvent, the court will relieve the defendant on equitable terms if he has a defense on the merits. But where a plaintiff, without serving a defendant, accepts the appearance of an unauthorized attorney for the defendant, the court will set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs and the expense to which he has been put from the delinquent attorney by summary proceedings.¹⁵⁵ It is the prevailing doctrine of the American cases that a judgment obtained against a party upon whom no process was served, and for whom an attorney has entered an appearance without authority, may be set aside, even at a subsequent term.¹⁵⁶ In some of the states, however, there is still a disposition to base a distinction on the question of the attorney's solvency, and to hold that the judgment should not be vacated, if he is able to respond in damages, though he was entirely without authority to appear.¹⁵⁷ At any rate,

¹⁵³ Gray v. Gates, 37 Wis. 614.

¹⁵⁴ Stotz v. Collins, 83 Va. 423, 2 S. E. Rep. 737.

¹⁵⁵ Bayley v. Buckland, 1 Exch. 1.

¹⁵⁶ Critchfield v. Porter, 3 Ohio, 518; Russell v. Pottawottamie Co., 29 Iowa, 256; Lyon v. Boilvin, 2 Gilm. 629; Mar-

vel v. Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424.

¹⁵⁷ University v. Lassiter, 83 N. Car. 38, citing Bacon's Abr., Atty. B. p. 496; Denton v. Noyes, 6 Johns. 295, 5 Am. Dec. 287; State v. McLaughlin, 28 Cal. 668; Schirling v. Scites, 41 Miss. 644;

the claim of a party for whom an appearance has been entered, to deny the authority of the attorney and ask relief, is viewed with great disfavor by the courts wherever innocent third persons have acquired rights under the judgment or decree sought to be annulled.¹⁰⁰ And relief will be denied where the fact of the attorney's authority is not fully negatived, but left in doubt under the testimony, and there is no allegation of a meritorious defense to the action.¹⁰⁰ Applications for relief against a judgment on this ground are more commonly made by bill in equity for an injunction against the enforcement of the judgment than by motion to vacate it, and the point will receive further consideration in connection with the former species of remedies.¹⁰⁰

§ 326. Irregularities.

It is a general rule that the court in which a judgment was rendered may vacate it, on motion, at the same or a subsequent term, on proof that it was entered irregularly and not according to the course of the court.¹⁰¹ Thus a judgment entered in favor of the plaintiff, before the time for answering has expired, may properly be set aside;¹⁰² and so may a judgment entered while there was an

Smith v. Bowditch, 7 Allen, 137. And see Powers v. Trenor, 3 Hun, 8.

¹⁰⁰ Kenyon v. Shreck, 52 Ill. 832.

¹⁰⁰ Russell v. Pottawottamie Co., 29 Iowa, 258.

¹⁰⁰ *Infra*, § 374.

¹⁰¹ Keaton v. Banks, 10 Ired. 881, 51 Am. Dec. 393; Dick v. McLaurin, 63 N. Car. 185; Cowles v. Hayes, 69 N. Car. 410; Branstetter v. Rives, 34 Mo. 318; Reynolds v. Stansbury, 20 Ohio, 344, 55 Am. Dec. 459; Winslow v. Anderson, 3 Dev. & Bat. 9, 82 Am. Dec. 661; Hervey v. Edmunds, 68 N. Car. 248; Foreman v. Carter, 9 Kans. 674; Hunt v. Yeatman, 8 Ohio, 16; Wolfe v. Davis, 74 N. Car. 597; O'Hara v. Baum, 82 Pa. St. 416; Murdock v. Steiner, 45 Pa. St. 349; Downing v. Still, 43 Mo. 309; Doan v. Holley, 27 Mo. 256; Craig v. Wroth, 47 Md. 281. "It is well set-

tled in this state that a judgment may be vacated or set aside on motion, at a term subsequent to the judgment term, for irregularity or improper conduct in procuring it to be entered. And this has become one of the accustomed and settled remedies for relief against judgments wrongfully obtained, where the impropriety or irregularity has not been superinduced by the fault or negligence of the judgment debtor." Huntington v. Finch, 3 Ohio St. 445. But some cases hold that if the alleged irregularity is not apparent on the face of the record, the power to vacate is limited to the term at which the judgment was rendered. Phillips v. Evans, 64 Mo. 17.

¹⁰² Remnant v. Hoffman (Cal.), 11 Pac. Rep. 319; Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218; Mailhouse v. In-

answer or demurrer on file and not yet disposed of.¹⁶⁸ Similarly, a judgment will be vacated which was rendered on issue joined without any notice of trial or appearance at the trial.¹⁶⁹ Or where a default was taken and final judgment entered on the first day of the term.¹⁶⁸ Or where an amendment was allowed which introduced an entirely new cause of action, and the defendant was defaulted without having had a proper opportunity to defend.¹⁶⁸ Or where the judgment was taken before the case regularly came up for hearing.¹⁶⁷ So a judgment may be set aside after the term if the verdict and judgment are for an amount in excess of the damages laid in the writ or claimed in the declaration or complaint.¹⁶⁸ Or if it was entered after the death of a party.¹⁶⁸ Or where a judgment was rendered on a joint contract against a part only of the defendants, when it should have been against all.¹⁷⁰ A judgment entered on a declaration reciting a bond and warrant of attorney to confess judgment, but without any appearance for the defendant or formal confession of judgment, will be set aside as irregular.¹⁷¹ So also will a judgment taken by default, where it appears that the real party in interest was not made a party to the action.¹⁷² But a defendant cannot have a judgment against him opened because the suit was brought in the name of a wrong person, if that person is authorized to receive satisfaction of the judgment and to give a valid discharge.¹⁷³ Inconsistency between the findings of fact and conclusions of law in the judgment of a referee confirmed by the court, is sufficient ground for setting the judgment aside.¹⁷⁴

does, 18 Md. 329. See *supra*, § 85. But see *per contra* Williamson v. Nicklin, 34 Ohio St. 128.

¹⁶⁸ Norman v. Hooker, 85 Mo. 386; Oliphant v. Whitney, 84 Cal. 25.

¹⁶⁹ People v. Bacon, 18 Mich. 247.

¹⁶⁸ Clegg v. Fithian, 83 Ind. 90.

¹⁶⁸ Weatherford v. Van Alstyne, 23 Tex. 22.

¹⁶⁷ Beach v. McCann, 1 Hilt. (N. Y.), 256; Findley v. Johnson, 1 Overt. 344.

¹⁶⁸ Barnes v. Branch, 8 McCord, 19;

Andrews v. Monllaws, 8 Hun. 65. See *supra*, § 188.

¹⁶⁹ Bowen v. Troy Mill Co., 31 Iowa, 460; Holmes v. Honle, 8 How. Pr. 384. See *supra*, § 199.

¹⁷⁰ Mullendore v. Silvers, 34 Ind. 98.

¹⁷¹ Lytle v. Colts, 37 Pa. St. 193. See also Knox Co. Bank v. Doty, 9 Ohio St. 505.

¹⁷² Ebell v. Bursinger, 70 Tex. 120, 8 S. W. Rep. 77.

¹⁷³ Grinnell v. Schmidt, 2 Sandf. 706.

¹⁷⁴ Moore v. Richardson, 5 S. Car. 142.

But on the other hand, it is not every trivial or inconsiderable irregularity that will support an application to vacate the judgment. The principles which should govern the exercise of this remedial power of the courts have been well stated by the supreme court of North Carolina in the following language: "A motion in the action to set aside the judgment for irregularity will be entertained by the court, if it should be made within a reasonable period after it was granted [rendered]. This, however, does not imply that every judgment affected in any degree, directly or indirectly, by some or any irregularity in the course of the action leading to it, will be set aside. Some irregularities are unimportant and do not affect the substance of the action or the proceedings in it; there are others of more or less importance that may be waived or cured by what may take place or be done in the action after they happen; and there are yet others so serious in their nature as to destroy the efficacy of the action and render the judgment in it inoperative and void. Whether the court will or will not grant such a motion in any case must depend upon a variety of circumstances, and largely upon their peculiar application to the case in which the motion shall be made. Generally a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be such as has worked, or may yet work, serious injury or prejudice to the party complaining interested in it, or when the judgment is void. The court will always, upon motion, strike from its record a judgment void for irregularity."¹⁷⁵ Although the irregularity might have defeated the proceeding, if objection had been timely and properly made, yet if it is such as must be deemed waived by the failure to object, it will not be ground for vacating the judgment.¹⁷⁶ A failure to give security for costs, under the general rule of the court, is no cause for setting aside the judgment.¹⁷⁷ It is also held that if any portion of a judgment is regular and valid, it will not be set aside as irregular and invalid upon motion.¹⁷⁸ An affidavit is not required to support a rule to strike off

¹⁷⁵ *Williamson v. Hartman*, 92 N. Car. 236.

¹⁷⁶ *Cosgrove v. Butler*, 1 S. Car. 241.

¹⁷⁷ *Doe dem. Lytle v. Fenn*, 8 McLean, 411.

¹⁷⁸ *Challis v. Headley*, 9 Kans. 684.

a judgment which, on the face of the record, appears to have been unlawfully and improvidently entered.¹⁷⁹

§ 327. Judgments against Persons under Disabilities.

We have already seen that a judgment against a married woman, rendered in an action to which her coverture, if pleaded, would have been a good defense, is certainly voidable, if not absolutely void;¹⁸⁰ and that the same is true of a judgment against an infant for whom no guardian was appointed or appeared.¹⁸¹ It follows, of course, that such judgments may be set aside, upon a proper and timely application by motion, by the court which rendered them. Where a statute provides that judgments shall not be set aside on motion, for irregularities, after the lapse of a certain time, this does not apply to cases where the motion is based on errors of fact; and it is held that the entry of a judgment against an infant is not an irregularity but an error of fact; and the statute does not affect the power of the court to vacate it on motion.¹⁸²

§ 328. Unauthorized Entries.

A judgment which was inadvertently or irregularly entered by the clerk of the court without any authority, may be vacated at any time.¹⁸³ In a case in Iowa, after an appeal had been perfected and a *supersedeas* bond filed, it was agreed between the parties to the action, without the consent of the sureties, that a judgment should be entered in the supreme court against the appellants and sureties, and a judgment of affirmance was accordingly entered. It was held that upon a motion made at the following term, at the instance of the sureties, the court had jurisdiction to set aside the judgment.¹⁸⁴

¹⁷⁹ Allen v. Krips, 119 Pa. St. 1, 12 Atl. Rep. 759.

¹⁸⁰ *Supra*, § 190.

¹⁸¹ *Supra*, §§ 198-196.

¹⁸² Powell v. Gott, 18 Mo. 458, 53 Am. Dec. 153; Levy v. Williams, 4 S. Car. 515; Keaton v. Banks, 10 Ired. 381.

¹⁸³ Merrick v. Baltimore, 43 Md. 219; Wharton v. Harlan, 68 Cal. 422, 9 Pac. Rep. 727; United States v. McKnight, 1 Cranch C. C. 84.

¹⁸⁴ Drake v. Smythe, 44 Iowa, 410.

§ 329. Judgment not Vacated because Erroneous.

The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or *certiorari*, according to the case, but it is no ground for setting aside the judgment on motion.¹²⁵ Thus, the reception of secondary or illegal evidence in proof of a fact is no ground to annul the judgment rendered in the case.¹²⁶ The statutes enacted in many of the states, granting power to vacate judgments rendered against a party through his "mistake, inadvertence, surprise, or excusable neglect," do not authorize the court at a subsequent term to set aside a judgment duly rendered for mere errors of law committed by the court.¹²⁷ So the decree of a court of equity cannot be set aside, on motion, for defective allegations in the bill or for defective pleadings; the proper remedy is by bill of review.¹²⁸

§ 330. Not for Grounds which might have been pleaded in Defense.

A motion or proceeding to vacate or set aside a judgment cannot be sustained on any grounds which might have been pleaded in defense to the action, and could have been so pleaded with proper care and diligence.¹²⁹ So where, in an action regularly commenced and prosecuted, without any fraud or fraudulent representations, judgment is rendered by consent against the defendants, they cannot

¹²⁵ *State v. Horton*, 89 N. Car. 581; *Taliaferro v. Steele*, 14 La. Ann. 656; *Harriman v. Swift*, 81 Vt. 385; *Peake v. Redd*, 14 Mo. 79; *Bank of United States v. Moss*, 6 How. 31.

¹²⁶ *Elder v. New Orleans*, 81 La. Ann. 500.

¹²⁷ *Loomis v. Rice*, 37 Wis. 262.

¹²⁸ *Brown v. Bennett*, 55 Ga. 189.

¹²⁹ *Robichaud v. Nelson*, 28 La. Ann. 578; *Barksdale v. Greene*, 29 Ga. 418; *Easley v. Camp*, 40 Ga. 698; *Field v. Sisson*, 46 Ga. 67.

thereafter have the judgment set aside and a new trial granted, on the ground of the existence of a complete legal defense to the action, the nature and extent of which they were aware of at the time of the entry of judgment.¹⁹⁰ A judgment will not be stricken off because the warrant of attorney on which it was entered appears to be dated on Sunday; courts will not, on such grounds, interfere with an executed contract.¹⁹¹ Where a judgment was obtained in a court of law, and an injunction was afterwards issued to restrain the collection of it, which injunction was dissolved and judgment entered on the injunction bond, it was held that a motion to vacate the latter judgment, upon an allegation that the original judgment had been satisfied by payment to the sheriff, could not be entertained; the proper course would have been to plead such payment or have satisfaction entered on the record.¹⁹²

§ 331. Illegality of Cause of Action.

An apparent exception to the rule stated in the preceding section is that in some jurisdictions the courts exercise the power to open or vacate judgments in cases where the consideration on which they are founded is tainted with illegality. Usury has been considered a good ground for calling this power into operation.¹⁹³ But the general rule is wise and salutary, and exceptions of this kind should not be received with any degree of favor where the party objecting (as will usually happen) was not prevented from setting up the illegality as a defense to the action. In Georgia, it was held that a constitutional provision that the courts should not render or enforce any judgment for a demand founded on slave property as the consideration, did not

¹⁹⁰ *Elder v. Bank*, 12 Kans. 242.

¹⁹¹ *Baker v. Lukens*, 85 Pa. St. 146.

¹⁹² *Council v. Willis*, 66 N. Car. 359.

¹⁹³ *Anderson's Appeal* (Pa.), 1 Atl. Rep. 329; *Fleming v. Jencks*, 22 Ill. 475. But if usurious interest has been paid on a judgment-note after judgment has been entered on it, that does not make it necessary to open the judgment in order to give the debtor proper relief.

The payment will be considered as an equitable payment on the judgment itself to the amount of the excess of interest, and the court may stay execution, as in any other case of alleged payment, until the facts can be ascertained and the just amount applied to the judgment. *Shafer's Appeal*, 90 Pa. St. 246.

authorize them to vacate a judgment already rendered on such a demand.¹⁸⁴

§ 332. Newly-discovered Evidence.

Where facts occur after judgment (or before judgment but after the time when the party can avail himself of them in the action) showing that the judgment ought not to be enforced, in whole or in part, relief may be given on account thereof, on motion to vacate the judgment, to order it satisfied, or to stay proceedings on it, according to the circumstances of the particular case.¹⁸⁵ But the party must be prompt and diligent. A judgment will not be vacated on the ground of newly-discovered evidence, when it appears that the defendant, knowing that the claim sued for was paid, and that there were receipts for its payment, yet neglected to appear and make efforts to procure evidence of the same.¹⁸⁶ And where a motion for a new trial has been overruled, on the ground that the newly-discovered evidence on which the application is based is not of sufficient importance for that purpose, the same evidence cannot be made the basis of a direct action to set aside the judgment.¹⁸⁷

§ 333. Judgment on Reversed Judgment.

Where suit is brought in one state, say Colorado, on a judgment rendered by a trial court in another state, say Illinois, and judgment recovered thereon, and subsequently the Illinois judgment, the case being removed by writ of error to the appellate court of that state, is reversed, these facts, being properly brought before the court, constitute good ground for vacating the judgment in Colorado.¹⁸⁸ Similarly, where a judgment is entered on a warrant of attorney, and a transcript of it taken to another county, and afterwards the original

¹⁸⁴ *Ransone v. Grist*, 40 Ga. 241; *Inman v. Jones*, 44 Ga. 44; *Bell v. Hanks*, 55 Ga. 274.

¹⁸⁵ *Cooley v. Gregory*, 16 Wis. 303; *Wells v. Wall*, 1 Oreg. 295.

¹⁸⁶ *Heathcote v. Haskins*, 74 Iowa, 566, 38 N. W. Rep. 417.

¹⁸⁷ *Mayor of New York v. Brady* (N. Y.), 22 N. E. Rep. 237.

¹⁸⁸ *Heckling v. Allen*, 15 Fed. Rep. 196; *Ætna Ins. Co. v. Aldrich*, 38 Wis. 107.

judgment is stricken off for cause, the judgment in the other county falls with it.¹⁹⁹ On analogous principles, when the defendant in a criminal case is tried, and a fine imposed on him, and judgment entered thereon for the amount of the fine and costs, and afterwards the governor remits the fine, the court should, on motion, vacate the judgment as to the fine, leaving it subsisting as to the costs.²⁰⁰

§ 334. Statutory Grounds for Vacating Judgments.

Hitherto we have been considering what may be called the common law grounds for vacating judgments,—those causes which, independent of statute, are recognized as sufficient to call into play the inherent power of courts of record to grant relief of this nature. In many of the states, however, the matter is regulated by statutes, which empower the courts to set aside judgments for certain enumerated causes within a limited time. Thus in ten states, the laws authorize the court, in its discretion and upon such terms as may be just, to relieve a party from a judgment or order taken against him through fraud or through his “mistake, inadvertence, surprise, or excusable neglect,” provided the application be made within a certain time after the rendition or entry of judgment (or “after notice thereof”) usually six months or a year.²⁰¹ In three others (Ohio, Iowa, and Kansas), the purport of the statute is substantially the same, though expressed in somewhat different language, the causes specified being “unavoidable casualty or misfortune preventing the party from prosecuting or defending,” “fraud practised by the successful party in obtaining the judgment,” mistake of the clerk, death of a party, etc.²⁰² In Connecticut, the statute authorizes the vacation of a judgment for mistake, accident, or other reasonable cause.²⁰³ The construction of these terms will mainly occupy our attention through

¹⁹⁹ *Banning v. Taylor*, 24 Pa. St. 297.

²⁰⁰ *Chisholm v. State*, 43 Ala. 527.

²⁰¹ Rev. Stats. Wis. § 2832; Code of New York, § 724; Code Civil Proc. N. Car. § 274; Code Civil Proc. Cal. § 473; Rev. Stats. Ind. (1881), § 896; Rev. Laws Vermont (1890), § 1422; Genl. Stats. Ne-

vada (1885), § 3217; Rev. Stats. Idaho (1887), § 4229; Code Civil Proc. Dak. § 148; Code Civil Proc. Colo. § 75.

²⁰² Rev. Stats. Ohio (1880), § 5354; Rev. Code Iowa (1880), § 3154; Compiled Laws Kans. (1885), § 4382.

²⁰³ Genl. Stats. Conn. (1888), § 1126.

the succeeding sections. But before passing on, it is necessary to observe that these statutes are exclusive with respect to the causes which they enumerate but not as to other possible causes. That is, if a party seeks relief on the ground of one of the causes specified in the statute, he must bring himself well within its terms and his application must be made within the time limited. But the fact that such and such causes are provided by statute does not prevent the courts from acting on other causes, just and reasonable in themselves and good at common law, and where an application is based on such a ground, outside the statute, it is not governed by the statute, in respect to the time of moving or otherwise.²⁹⁴

§ 335. Mistake.

The ground of "mistake" specified by these statutes is one upon which the decisions are not very numerous, inasmuch as it usually blends into that of "excusable neglect." Nor are the rulings so harmonious and consistent as to indicate the general rules in any satisfactory manner. In one case, the defendant's affidavit stated that it was necessary for him to make inquiries in different places in order to ascertain facts preparatory to his defense, and that in consequence of the multitude and character of his business engagements calling him away from home, he mistook the time within which he was to answer. The application being made with due diligence, and merits being shown, it was held that the judgment by default against him should be vacated.²⁹⁵ On the other hand, an affidavit that the party defaulted mistook the court in which his case was pending does not show sufficient ground for setting aside the judgment.²⁹⁶ But where the default was shown to have been caused by the ignorance of the defendant and his becoming confused between a civil and a criminal action touching the same subject-matter and pending at the same time, this was considered a sufficient excuse.²⁹⁷ In an action to set

²⁹⁴ *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. Rep. 842; *Cowles v. Haynes*, 69 N. Car. 406; *Bond v. Epley*, 48 Iowa, 600. See *People v. O'Connell*, 23 Cal. 281.

²⁹⁵ *Johnson v. Eldred*, 13 Wis. 483.

²⁹⁶ *Robertson v. Bergen*, 10 Ind. 402.

²⁹⁷ *Bertline v. Bauer*, 25 Wis. 486.

aside a judgment on the ground of mistake, if the complaint fails to make explanation of the mistake or the causes which produced it, it fails to set forth facts sufficient to constitute a cause of action.²⁰⁸ The mistake which will justify this relief may also be the mistake of the court. But "wherever it may be found that inadvertence or mistake is held to be a ground for setting aside a judgment, it will be noticed that it is not a mistake of the law, or an inadvertent conclusion by the court as to what the law is, but a mistake or inadvertence in doing something *not intended* to be done."²⁰⁹ And where the judgment entered on the journal is different from what was intended by the court, but is shown to be such as *ought* to have been rendered, it will not be vacated or modified as entered by mistake.²¹⁰

§ 336. Surprise.

Under a statute which empowers the court, within a year after notice of a judgment, to relieve a party therefrom on the ground of "surprise," the fact that the party was surprised by a ruling of the court, refusing to continue the cause on his motion, is not sufficient.²¹¹ It is probable that the species of surprise primarily contemplated by these statutes is that which results from the taking of a judgment against a party in violation of an agreement or understanding that the case should be continued or not pressed, or not brought to trial,²¹² though that is also a kind of fraud. In a recent case in West Virginia, the facts were as follows: An action was brought in 1875 in the county court, and two years later it was transferred to the circuit court, no order except continuances being made in it after such transfer. The judge of the circuit court could not preside at the trial, and in 1887 the plaintiff, in the absence of the defendant and his counsel, caused a special judge to be elected, and, without the knowledge of the defendant, the case was tried, and a verdict and judgment rendered for the plaintiff. The defendant, being notified

²⁰⁸ *Douglass v. Brooks*, 38 Cal. 670.

²⁰⁹ *Cooper v. Duncan*, 20 Mo. App. 855.

²¹⁰ *Murphy v. Swadner*, 34 Ohio St. 672.

²¹¹ *Breed v. Ketchum*, 51 Wis. 164, 7 N. W. Rep. 550. See *Winter v. State*, 18 Ga. 275.

²¹² See, *supra*, § 323.

of such judgment, moved the court to set the same aside because of the facts above stated, and upon his affidavit alleging surprise and the full payment of the debt sued on, the circuit court set aside the judgment and awarded the defendant a new trial. In this, it was held there was no error.²¹³ So again, where the respondent to a petition for a writ of prohibition files a demurrer and answer, and the demurrer is overruled, and judgment absolute given against him on the insufficiency of his answer, when, in the absence of a motion for judgment on the pleadings, he expected that only the demurrer would be passed on, a motion to vacate the judgment, for surprise, will be granted.²¹⁴

§ 337. Casualty or Misfortune.

As we have already stated, it is only in three states that "unavoidable casualty or misfortune preventing the party from defending or prosecuting" is specifically named as a ground for vacating judgments. Yet the decisions under this clause are of general importance. For it cannot be doubted that failure to appear in consequence of an unavoidable casualty or misfortune would be a case of "excusable neglect" within the statutes in other states. An affidavit that the defendant was prevented from being present at the trial by an unavoidable railroad accident, shows a sufficient ground for vacating a judgment against him on default, if it appears that he has a good defense.²¹⁵ But that the party wrote to an attorney to appear for him, though without disclosing his defense, and had no knowledge that his letter was not delivered to the attorney until after the judgment was rendered and the court had adjourned, is not a sufficient excuse.²¹⁶ That the defendant was of unsound mind and therefore incompetent to make an intelligent defense to the action, is such a casualty or misfortune as will authorize the court to vacate a judgment against him.²¹⁷ If a party is deprived of the opportunity to

²¹³ *Bennett v. Jackson*, (W. Va.) 11 S. E. Rep. 734.

²¹⁴ *Heilbron v. Campbell* (Cal.), 28 Pac. Rep. 1082.

²¹⁵ *Omro v. Ward*, 19 Wis. 233.

²¹⁶ *School District v. Lovejoy*, 16 Fed. Rep. 828.

²¹⁷ *Bean v. Haffendorfer*, 84 Ky. 685, 2 S. W. Rep. 556; 3 S. W. Rep. 188.

interpose a meritorious defense by being detained as a convict in the penitentiary, the court may, on a proper application after his release, open the default and vacate the judgment.²¹⁸ But mere ignorance of the English language is not a sufficient ground for such relief, if the defendant knew that a suit had been commenced against him.²¹⁹

§ 338. Sickness of Defendant.

In some of the states, it is held that the illness of a party, occurring on or continuing through the day of trial, and so severe as to confine him to his house and prevent him from attending the court and trying his suit, is such an "unavoidable casualty or misfortune" as entitles him to have the judgment against him set aside.²²⁰ And in other states, this is considered a case of "excusable neglect."²²¹ But in some few jurisdictions there is a manifest reluctance to admit sickness as a sufficient excuse. In Georgia, a motion to set aside a judgment by default, on the ground that the defendant was sick when it was rendered and could not put in his plea, was overruled, no reason being shown why the plea was not filed before the trial term.²²² And in Indiana, the latest rulings decide that a judgment should not be vacated because the defendant was too sick to be present at the trial, as he might have appeared by attorney.²²³ This seems to be the doctrine also in Illinois.²²⁴ In one case the defendant showed that he was confined to his house, during the pendency of the action, by a wound in the foot, but the court refused to open the judgment.²²⁵ The sickness of a member of the defendant's family may be a ground upon which the judge may grant a continuance, but it is not a reason for setting aside a default.²²⁶

²¹⁸ *Bonnell v. R. W. & O. R. Co.*, 12 Hun, 218.

²¹⁹ *Heisterhagen v. Garland*, 10 Mo. 66.

²²⁰ *Gheer v. Huber*, 82 Kans. 319, 4 Pac. Rep. 290; *Luscomb v. Maloy*, 26 Iowa, 444.

²²¹ *Sage v. Matheney*, 14 Ind. 369; *Flanagan v. Patterson*, 78 Ind. 514; *Monroe v. Paddock*, 75 Ind. 423; *De-*

priest v. Patterson, 85 N. Car. 376; *Goodhue v. Meyers*, 58 Tex. 403.

²²² *Cannon v. Harrold*, 61 Ga. 158.

²²³ *Jonsson v. Lindstrom*, 114 Ind. 152, 16 N. E. Rep. 400.

²²⁴ *Shaffer v. Sutton*, 49 Ill. 506; *Edwards v. McKay*, 78 Ill. 570.

²²⁵ *Gardenhire v. Vinson*, 39 Ark. 270.

²²⁶ *Skinner v. Bryce*, 75 N. Car. 287.

§ 339. Sickness of Counsel.

It is held by several very respectable authorities that the illness of defendant's counsel, so severe as to prevent him from appearing and trying the case, is a good ground for vacating the judgment.²²⁷ This, however, has been fairly denied.²²⁸ It seems reasonable to hold that such an excuse would not be sufficient if the party had any opportunity to retain other counsel, or otherwise to escape the default or verdict. But if the attorney's illness was so sudden that there was no time to employ other counsel, or if it was unknown to the defendant, or he was unable to act in the matter, or no one was present to ask for a continuance, it would be manifestly unjust to visit the misfortune upon the defendant who was guilty of no carelessness or lack of diligence. And indeed the cases hold that if *both* the attorney and the defendant were sick, whereby the former was prevented from attending to the case and the latter was prevented from retaining other counsel, the judgment should be vacated.²²⁹ Whether the illness or death of a member of the attorney's family occurring at such a juncture as to draw him away from the case, is a sufficient ground for relief, is an unsettled question.²³⁰ But without doubt it should be decided on the lines above laid down with respect to the counsel himself. In a case where the defendant employed a prominent attorney, who died three weeks before the return term, and whose death was conspicuously noticed in the newspapers, and the defendant then neglected to employ other counsel, and suffered a default, it was held that he was not entitled to have the judgment vacated.²³¹

§ 340. Excusable Neglect.

The "excusable neglect" of the defendant is specifically mentioned, in the statutes of several states, as one of the grounds upon which

²²⁷ *Wilmarth v. Gatfield*, 1 How. Pr. 52; *Bristor v. Galvin*, 63 Ind. 352; *Stout v. Lewis*, 11 Mo. 438.

²²⁸ *Clark v. Ewing*, 98 Ill. 572; *McFarland v. White*, 18 La. Ann. 394.

²²⁹ *Harvey v. Wilson*, 44 Ind. 281; *Goodhue v. Meyers*, 58 Tex. 405.

²³⁰ Compare *Powell v. Washington*, 15 Ala. 803, with *Stout v. Lewis*, 11 Mo. 438.

²³¹ *Kivett v. Wynne*, 89 N. Car. 89.

judgments may be set aside.²³³ And under this designation may be classed the unavoidable absence of the party. Thus where, on the second day of the term, the defendant in a suit in which no answer had yet been put in was compelled to appear before the grand jury, and was still before them when the court adjourned at a time earlier than usual, and did afterwards file his answer with the clerk on the same day, it was held that he was entitled to have a judgment by default rendered against him on the said second day set aside.²³³ So also where the defendant was necessarily absent in the actual military service of the United States;²³⁴ and so where his failure to appear was on account of his compulsory attendance on the federal court elsewhere.²³⁵ A default will be set aside when the defendant relied on the assurance of a co-defendant and of competent counsel that the co-defendant's answer was a perfect defense and would protect both;²³⁶ or that he need not trouble himself about the joint obligation, as the other makers would pay it, his name having been forged;²³⁷ or where he relied on the statement of the plaintiff's assignor as to the purpose of the suit.²³⁸ But the fact that the defendant supposed a summons which was served on him to be a paper in another cause pending between himself and the plaintiff, and for that reason took no measures to answer it, is not excusable neglect.²³⁹ However, where the officer did not read or give a copy of the summons to the defendant, but told him it was a subpoena for him as a witness in a case pending in another court than the one from which the summons issued, and the defendant did not learn the truth until too late, this was held a sufficient excuse.²⁴⁰ If the party's negligence is without excuse or justification, he must suffer the consequences.²⁴¹ And it is gross negligence to pay no attention to an action for eighteen months after service of process.²⁴² In a case in North Carolina, it appeared

See *Boyle v. Solstien* (Cal.), 16 Pac. Rep. 898.

²³³ *Supra*, § 384. See *Egan v. Rooney*, 88 How. Pr. 121. And see *Keith v. McCaffrey*, 145 Mass. 18, 13 N. E. Rep. 419.

²³⁴ *Frazier v. Bishop*, 29 Miss. 447.

²³⁵ *Piper v. Aldrich*, 41 Mo. 421.

²³⁶ *Tullis v. Scott*, 88 Tex. 537.

²³⁷ *Wicke v. Lake*, 21 Wis. 410.

²³⁸ *Rowland v. Jones*, 2 Heisk. 331.

²³⁹ *Birch v. Frantz*, 77 Ind. 199.

²⁴⁰ *White v. Snow*, 71 N. Car. 232.

See *State v. O'Neil*, 4 Mo. App. 231.

²⁴¹ *Hite v. Fisher*, 76 Ind. 281.

²⁴² *Brand v. Stafford*, 28 La. Ann. 51.

²⁴³ *Grootemaat v. Tebel*, 39 Wis. 576.

that the defendant had subpoenaed witnesses and supposed they would be present; he had also retained counsel and fully informed him of his defense; he thought his own presence at the trial would not be necessary, and therefore did not attend. But the witnesses failed to appear, and there was no one to ask for a continuance, wherefore a judgment was taken against him. The court held that his negligence was inexcusable and the judgment should not be opened.³⁴³ Nor is it a case of excusable neglect when the only reason for not filing an answer in time was that the peculiar nature of the case required more than the usual time in the preparation of an answer and the attorney could not give it his undivided attention.³⁴⁴ A verdict and judgment will not be set aside on the ground that the defendant has been prevented, by a mistake and without fault, from being represented at the trial and making his defense, when the defense which he sets up in the affidavits in support of his motion is entirely new and not disclosed by the original pleadings.³⁴⁵

§ 341. Negligence of Attorney.

In a majority of the states, the courts have steadily refused to set aside a judgment on the sole ground of the neglect, carelessness, or mistake of the attorney for the party against whom it was rendered. The act or omission of the attorney is the act or omission of the client, and no negligence will be excusable in the former which would not be excusable in the latter.³⁴⁶ This view has recently found expression in a case in Kansas, of which the circumstances

³⁴³ Waddell v. Wood, 64 N. Car. 624.

³⁴⁴ Bailey v. Taaffe, 29 Cal. 422.

³⁴⁵ Kehler v. New Orleans Ins. Co., 23 Fed. Rep. 709.

³⁴⁶ Babcock v. Brown, 25 Vt. 550, 60 Am. Dec. 290; Davison v. Heffron, 81 Vt. 687; Burke v. Stokely, 65 N. Car. 569; Foster v. Jones, 1 McCord, 116; Tarrant Co. v. Lively, 25 Tex. Supp. 899; Welch v. Challen, 31 Kans. 696, 3 Pac. Rep. 314; Kreite v. Kreite, 93 Ind. 583; Spaulding v. Thompson, 12 Ind. 477, 74 Am. Dec. 221; Jones v. Leech, 46 Iowa,

186; Niagara Ins. Co. v. Rodecker, 47 Iowa, 162; Ordway v. Suchard, 81 Iowa, 481; State v. Elgin, 11 Iowa, 216; Bosbyshell v. Summers, 40 Mo. 172; Austin v. Nelson, 11 Mo. 192; Gehrke v. Jod, 59 Mo. 522; Kerby v. Chadwell, 10 Mo. 392; Matthis v. Cameron, 62 Mo. 504; Merritt v. Putnam, 7 Minn. 493, (Gil. 399); Smith v. Tunstead, 56 Cal. 175; People v. Rains, 23 Cal. 127; Ekel v. Swift, 47 Cal. 620; Harper v. Mallory, 4 Nevad. 447.

were so unusually severe as to deserve somewhat detailed mention. It appeared that the plaintiff resided in Kansas and the defendants in another state; that the defendants employed an attorney in Kansas to file an answer and attend to the case; that the attorney never filed such answer, but, before the time for filing it had expired, he left the state, and never returned, and no answer was ever filed in the case; that after more than four months had elapsed since the defendants made default by not filing an answer, a judgment was rendered against them in accordance with the prayer of the plaintiff's petition; that the defendants had no knowledge of the negligence of their attorney, or of the rendition of such judgment, until a long time after both had occurred; that the attorney was insolvent; and that the defendants had a good defense to the action. It was held that neither of these circumstances, nor all combined, could be considered such an "unavoidable casualty or misfortune preventing the party from defending" the action, that the defendants could have the judgment vacated and be let in to defend.²⁴⁷ It is generally held that the attorney's neglect to file a plea in the action will not justify the setting aside of a judgment by default.²⁴⁸ But a case in New York holds that where the defendant's counsel omitted to enter a plea, and the neglect of the client to examine the records to see whether his plea was on file was excusable, there was good ground to open the judgment.²⁴⁹ Where a party had time to give his personal attention to the defense of the action before a default was entered, and he failed to do so, it was held that the fact that counsel, whom he supposed he had engaged to make his defense, omitted to do so, did not make it imperative on the court to set aside the default.²⁵⁰ Nor will a default be vacated because the attorney miscalculated the time within which he was required to answer.²⁵¹ Nor because, after preparing a demurrer, he failed to file it in time, in consequence of a mistake on his part as to the day on which the time

²⁴⁷ *Welch v. Challen*, 81 Kans. 696, 8 Pac. Rep. 314.

²⁴⁸ *Austin v. Nelson*, 11 Mo. 192; *Kerby v. Chadwell*, 10 Mo. 392; *Harper v. Mallory*, 4 Nevad. 447; *Tarrant Co. v.*

Lively, 25 Tex. Supp. 399; *Jones v. Leech*, 46 Iowa, 186.

²⁴⁹ *Clark v. Lyon*, 2 Hilt. 91.

²⁵⁰ *Schroer v. Wessell*, 89 Ill. 113.

²⁵¹ *Smith v. Watson*, 28 Iowa, 218.

for filing would expire.²⁵² Nor will the client be relieved from the operation of a judgment rendered by reason of the inexcusable neglect of his attorney in so conducting the case that it was defaulted, although there may have been a sufficient defense.²⁵³

On the other hand, it is held in a few states (and notably in New York) that the negligence of the attorney is a sufficient ground for setting aside the judgment, provided the client himself was not directly in fault.²⁵⁴ A party may be relieved from a judgment obtained against him by reason of the negligence, ignorance, or fraud of his attorney, without compelling him to resort to an action against the attorney or show the latter to be insolvent.²⁵⁵ And even in the states which generally adhere to the stricter rule, there is a disposition to relax it somewhat under exceptional circumstances. Thus, where an attorney overlooked the case on the trial-calendar, by reason of its being placed thereon under a title calculated to mislead, and the case was called and defaulted, and there was a meritorious defense, it was held that the default and judgment rendered thereon might be set aside, application being made at the same term.²⁵⁶ So where it was made to appear by affidavit of defendant's attorneys that the reason why they they did not appear and file an answer was on account of an accidental misplacement of the petition and notice handed to them by the plaintiff, whereby the case was overlooked by them in examining their papers at the commencement of the term, in order to ascertain what cases they had to attend, it was considered that setting aside the default was no abuse of discretion.²⁵⁷ So it is

²⁵² *People v. Rains*, 23 Cal. 127.

²⁵³ *Brumbaugh v. Stockman*, 88 Ind. 588.

²⁵⁴ *Nash v. Whetmore*, 83 Barb. 159; *Curtis v. Ballagh*, 4 Edw. Ch. 639; *Clark v. Lyon*, 2 Hilt. 91; *Phillips v. Hawley*, 6 Johns. 129; *Tripp v. Vincent*, 8 Paige, 180; *Millsbaugh v. McBride*, 7 Paige, 509, 84 Am. Dec. 360; *Meacham v. Dudley*, 6 Wend. 514. And see also *Thompson v. Goulding*, 5 Allen, 82; *Bradford v. Coit*, 77 N. Car. 73; *Griel v. Vernon*, 65 N. Car. 76; *Hanson v. Michelson*, 19 Wis. 496; *Babcock v. Perry*, 4 Wis. 81.

But the mere fact that the defendant wrote to an attorney requesting him to enter an appearance for him, which the attorney failed to do, in consequence of which judgment was entered by default, does not make out such a case of "excusable neglect" as would justify the court in vacating the judgment. *Burke v. Stokely*, 65 N. Car. 569.

²⁵⁵ *Sharp v. Mayor of New York*, 81 Barb. 578.

²⁵⁶ *Allen v. Hoffman*, 12 Ill. App. 573.

²⁵⁷ *Ordway v. Suchard*, 81 Iowa, 481.

proper to vacate an order of dismissal, on motion of the plaintiff's attorney, supported by his statement that he had consented to the dismissal improvidently, and accompanied by his offer to refund the costs paid by the defendant after notice of the motion.²⁸⁸ The negligence of any person who is delegated or employed by the attorney to attend to the case or take his place is of course imputable to the attorney himself, and will not be excusable in the one unless it would have been in the other.²⁸⁹ The attorney for the defendants in a suit, being necessarily absent at the return term, employed another attorney to appear for him and gave him the name of the case as "Webster v. Harris & Williams." The case was entered upon the docket "Webster v. McMahon etc." The substitute, not knowing the cases to be the same, did not enter an appearance, and judgment was taken by default. The court refused to set it aside.²⁹⁰

§ 342. Misunderstanding of Counsel.

A misunderstanding between the defendant in an action and an attorney, as to whether the latter had been retained or not, in consequence of which the judgment goes by default, will be good ground, provided the mistake was genuine, for setting aside the judgment.²⁹¹ So where, in consequence of a misunderstanding between a defendant and his attorney, attributable to the negligence of a third person, the real defense is not interposed, and he does not discover the fact until after judgment has been recovered against him, it is no abuse of discretion to vacate the judgment.²⁹² So in a case where the defendant in a judgment by default applied to the court to open the same, and showed in his affidavit that he believed the case was being defended in his behalf by the attorneys who represented his co-defendants, and the record entries in the early stages of the cause showed that those attorneys appeared for "the defendants" generally, and

²⁸⁸ Benwood Co. v. Tappan, 56 Miss. 659.

²⁸⁹ Davison v. Heffron, 81 Vt. 687.

²⁹⁰ Webster v. McMahan, 18 Mo. 582.

²⁹¹ Panesi v. Boswell, 12 Heisk. 323;

McKinley v. Tuttle, 84 Cal. 235; Beatty v. O'Connor, 106 Ind. 81, 5 N. E. Rep. 890.

²⁹² Dixon v. Lyne (Ky.), 10 S. W. Rep.

469.

there was shown to be a good defense on the merits, it was held that good cause appeared for opening the judgment.²⁸³

§ 343. Unavoidable Absence of Counsel.

Where, in the unavoidable absence of the defendant's attorney (as, when he is engaged in trying a case in another court, which was begun before the plaintiff's case was called, and is unexpectedly protracted) a judgment is entered for the plaintiff, if all appears to have been done in good faith, and the defendant could not proceed without his counsel, and there is a meritorious defense, the cases generally hold that this will be good ground for vacating the judgment.²⁸⁴ But in Georgia the courts consider that the fact that counsel had professional business in two justice's courts on the same day, and was absent from one, believing he had leave of absence to attend to business in the other, is no cause for setting aside a judgment rendered during his absence, when it appears from the magistrate's return that he neither had leave of absence nor any sufficient reason to think he had.²⁸⁵

§ 344. Fraud of Attorney.

If an attorney corruptly sells out his client's interest to the other side, a judgment thus obtained may be set aside on the charge of fraud. So also, if a plaintiff is guilty of so influencing the attorney of the defendant by the payment of money without the knowl-

²⁸³ *Kupferle v. Merchants' Nat. Bank*, 32 Ark. 717. See a similar case, *Heaps v. Hoopes*, 68 Md. 888, 12 Atl. Rep. 882.

²⁸⁴ *McArthur v. Slauson*, 60 Wis. 293, 19 N. W. Rep. 45; *Beall v. Marietta*, 45 Ga. 28; *Stout v. Lewis*, 11 Mo. 488. In a case in Indiana, the defendant moved to set aside a default and judgment against him, and filed affidavits in support of his motion. The affidavits disclosed that he had employed counsel to defend for him, and had caused a subpoena to issue for his witnesses; that he had been prevented from attending

court himself by the dangerous illness of his wife; and that his attorney, being provost-marshal of the district, had been so engaged in enforcing the draft that he had been unable to attend the court, and had neglected to speak to any other attorney to represent him in the case. The affidavits also disclosed a meritorious defense to the action. It was held that the motion to set aside the judgment should have been granted. *Hill v. Crump*, 24 Ind. 291.

²⁸⁵ *Western & A. R. Co. v. Pitts*, 79 Ga. 532, 4 S. E. Rep. 921.

edge or consent of his client, as to make it the interest of such attorney that the plaintiff should obtain a judgment against his client, and such attorney, in the absence of his client, does not make any opposition to the rendition of the judgment in favor of the plaintiff, a new action may be maintained by the defendant to set aside such judgment and open the case for a new and fair hearing.²⁶⁶

§ 345. Misinformation as to Time of Trial.

Where the affidavit in support of a motion to set aside a default shows that the defendant and his counsel had been in attendance upon the court until the announcement was made by the judge that the case would not be tried at that term, and that upon the faith of this statement they left the court, after which a judgment by default was entered, and the affidavit also discloses a meritorious defense, there will be good cause for opening the default.²⁶⁷ Where defendant and his attorney both resided out of the county, and the latter overlooked the fact that the law had been changed so as to fix the term of court at an earlier date, and relied on the assurance of the judge at a former term that nothing would be done in the case without notice to him, it was held that there was no abuse of discretion in setting aside the default.²⁶⁸

PART VII. PRACTICE ON VACATING JUDGMENTS.

§ 346. Notice of Application.

Where the power to vacate judgments depends upon such statutory provisions as we have been considering, it is generally requisite that notice of the application be given to the other party. But at common law this is not always necessary. It is not irregular for a

²⁶⁶ *Haverty v. Haverty*, 85 Kans. 488, 11 Pac. Rep. 364; *Beck v. Bellamy*, 98 N. Car. 129.

Ind. 402; *Sanders v. Hall*, 87 Kans. 371, 15 Pac. Rep. 197.

²⁶⁷ *Ratliff v. Baldwin*, 29 Ind. 16, 93 Am. Dec. 330; *Cruse v. Cunningham*, 79

²⁶⁸ *Jean v. Hennessey*, 74 Iowa, 348, 87 N. W. Rep. 771; *Buena Vista Co. v. Railroad*, 49 Iowa, 657.

court to set aside *during the term* a judgment rendered by it, without notice to the defendant. It cannot be assumed that the want of notice was prejudicial to him, the court having authority to set aside such judgment despite any objections he could make.²⁶⁶ And in one case this was done, without notice, although the docket had been closed, the plaintiff's counsel had left the court, and a similar motion had been previously refused.²⁷⁰ But after the term the case is different. Then the parties are no longer before the court, actually or constructively, and a judgment cannot be set aside on motion without notice to the adverse party or his representatives.²⁷¹ The notice should in general be addressed to and served upon the party himself. But it is held that the authority of an attorney so far continues after final judgment that service on him of notice of a motion to vacate the judgment for fraud in obtaining it will bind his client.²⁷² And no

²⁶⁶ Smith v. Robinson, 11 Ala. 270; Rich v. Thornton, 69 Ala. 478; Desribes v. Wilmer, 69 Ala. 25, 44 Am. Rep. 501; Lake v. Jones, 49 Ind. 297; Burnside v. Ennis, 43 Ind. 411; Yancy v. Teter, 39 Ind. 305.

²⁷⁰ Allison v. Whittier (N. Car.), 8 S. E. Rep. 338.

²⁷¹ Ingram v. Belk, 2 Rich. 111; Martindale v. Brown, 18 Ind. 284; Smith v. Chandler, 13 Ind. 518; Lake v. Jones, 49 Ind. 297; Burnside v. Ennis, 43 Ind. 411; Yancy v. Teter, 39 Ind. 305; Lane v. Wheless, 46 Miss. 686; Coleman v. McAnulty, 16 Mo. 178; Nuckolls v. Irwin, 2 Nebr. 60; Hettrick v. Wilson, 12 Ohio St. 136, 30 Am. Dec. 337.

²⁷² Beach v. Beach, 48 N. W. Rep. 701. In this case the supreme court of Dakota discussed the point in the following manner: "Did the court have jurisdiction of the plaintiff for the purpose of determining said motion? The general rule undoubtedly is that the power of an attorney under a general retainer expires when judgment is finally rendered, for usually there no longer exists any occasion for his services. The judgment is the final determination of the matters about which the attorney

was retained. Macbeath v. Cook, 1 Moore & P. 518. But this is not so for every purpose, for at the common law the attorney's power was supposed to continue a sufficient length of time after entry of judgment to permit him, where successful, to issue execution, and until such action as might be necessary for the collection and satisfaction of the judgment. Gilb. Ex'ns, 93. This rule has become a part of the statute law of this territory to such an extent that the attorney of record for the successful party may at any time collect the judgment and execute satisfaction thereof. Section 5107, Comp. Laws. So after final judgment, if appeal be taken or writs of error brought, the employment of the attorney of record, in the absence of special notice indicating the contrary, is presumed to have continued, and the statute provides that notice shall be served upon them in such case. Section 5336, Id. This was also the rule before the Code. If the judgment be entered irregularly, shall not the attorney whose duty it was to enter it properly be served with notice of motion that it be corrected? It would seem that he more than any

notice to the adverse party of such a motion is necessary when he is present by his counsel at the time the motion is made.²⁷³ If the party is dead, his personal representative should receive the notice. The proper practice is to take an order reciting the judgment, the grounds relied on, the death of the party, and the qualification of the representative, and calling upon him to show cause why the judgment complained of should not be set aside, and this order should be served as others are.²⁷⁴ Where a judgment which had been standing for several terms, and upon which an execution had issued, resulting in the sale of defendant's land, had been set aside on motion of the defendant, it was held that no notice of a motion on the part of the plaintiff to revoke the order setting the judgment aside, and to reinstate the same and the execution on the docket, was necessary.²⁷⁵

§ 347. Affidavit of Merits.

Where application is made to open a judgment, under the statutes for that purpose, it must be accompanied by an affidavit setting forth a good defense on the merits, and showing that the default occurred through mistake, surprise, or other statutory ground, and stating the facts constituting such mistake, surprise, etc., and also showing due diligence.²⁷⁶ And independently of statutes, it has always been the

other person, even the party himself, is the one that ought to be notified; for, having been the attorney of record, and conducted the matters to a conclusion, he is best able to resist any attack upon it. These reasons apply with quite as much force when, as in this case, it is sought to set the judgment aside for fraud and want of jurisdiction in the court rendering it. *Lusk v. Hastings*, 1 Hill, 656, is analogous in many respects; and see, also, *Doane v. Glenn*, 1 Colo. 454. In *Lee v. Brown*, 6 Johns. 182, it was directed that an order to show cause why a judgment that had been entered seven years before should not be satisfied of record should be served on the attorney of record at the

time the judgment was entered, the plaintiff in such judgment being absent from the state. If doubt remained of the sufficiency of the service of the notice, it would be dissipated by the admission of plaintiff's attorney that he had received a communication from plaintiff personally informing him substantially that he had forwarded affidavits to him to be used in resisting the motion, and he did use them in opposition thereto. We conclude that the first assignment of error, therefore, is insufficient, and must be overruled."

²⁷³ *Hill v. Crump*, 24 Ind. 291.

²⁷⁴ *Grier v. Jones*, 54 Ga. 154.

²⁷⁵ *Perry v. Pearce*, 68 N. Car. 367.

²⁷⁶ *Van Horne v. Montgomery*, 5 How.

practice of our courts, from the very earliest times, on an application to open or set aside a judgment, to require some sort of showing, by affidavit or otherwise, that the judgment is unjust as it stands and prejudicial to the party complaining, and that he has a meritorious defense.²⁷⁷ It may therefore be regarded as a universal requirement. But the rule is subject to a few well-defined exceptions in peculiar cases. Thus a judgment by default, entered before the court has acquired jurisdiction in the case, may be set aside without an affidavit of merits.²⁷⁸ So the rule does not apply where it was grossly irregular for the default to have been entered;²⁷⁹ nor where the defendant complains of irregularity amounting to denial of his substantial rights.²⁸⁰ But in all cases where the application is not based upon want of jurisdiction or irregularity, but upon something presented as an *excuse* by the defendant, he must make an affidavit of merits. And nothing else can take its place and serve its purpose. An answer to the complaint, already on file or which the defendant proposes to file, is not equivalent to an affidavit of merits, although it discloses a defense apparently complete and meritorious, and although it is verified.²⁸¹ In several of the states the authorities hold that this affidavit is not sufficient if it merely states that the defendant *has* a meritorious defense to the action; but it must contain a full statement of the *facts* constituting the proposed defense, in order that the court may judge whether it is a good and meritorious defense or

Pr. 238; Hunt v. Wallis, 6 Paige, 371; Draper v. Bishop, 4 R. I. 489; Richardson v. Finney, 6 Dana, 319; Foster v. Martin, 20 Tex. 118; Cook v. Phillips, 18 Tex. 81; Watson v. Newsham, 17 Tex. 487; Frost v. Dodge, 15 Ind. 189; Dale v. Bugh, 16 Ind. 233; Lake v. Jones, 49 Ind. 297; Grubb v. Crane, 5 Ill. 158; Lamb v. Nelson, 84 Mo. 501; Palmer v. Russell, 84 Mo. 476; Adams v. Hickman, 43 Mo. 168; Butler v. Mitchell, 15 Wis. 355; People v. Rains, 28 Cal. 127; Bailey v. Taaffe, 29 Cal. 422; Reese v. Mahoney, 21 Cal. 305; Parrott v. Den, 84 Cal. 79.

²⁷⁷ Miller v. Alexander, 1 N. J. Law, 400.

²⁷⁸ Rice v. Griffith, 9 Iowa, 589; Branstetter v. Rives, 84 Mo. 818.

²⁷⁹ Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218.

²⁸⁰ Walla Walla Printing Co. v. Budd, 2 Wash. Ter. 336, 5 Pac. Rep. 602.

²⁸¹ Mowry v. Hill, 11 Wis. 146; Jones v. Russell, 8 How. Pr. 324. But see Omro v. Ward, 19 Wis. 232. In Nebraska, when a defendant files a motion to set aside a judgment rendered by default, and for leave to answer, he must accompany his motion with his proposed answer, duly verified. Spencer v. Thistle, 18 Nebr. 227, 13 N. W. Rep. 214.

not.²²³ But in some other states it is considered that the affidavit of merits is sufficient if it sets forth that the defendant has fully and fairly stated the case to his counsel and that he is advised by him, and believes, that he has a full, perfect, and meritorious defense to the action.²²³ But an affidavit thus framed must allege that he has stated the "case" or "the facts of the case" to his counsel; if it merely shows that he has stated the "facts of his defense" to the counsel, it will not be sufficient.²²⁴ And it seems that this manner of averring merits will not answer at all in chancery. Such an affidavit is not sufficient to authorize a court of equity to set aside a regular default or decree, but the affidavit should state the substance of the defense, or it should be stated under oath in some form, so that the court may judge whether it is meritorious.²²⁵ The affidavit should be made by the applicant himself, unless good reasons exist for having it made by another person.²²⁶ It may be made by an attorney if he has personal knowledge of the facts to be sworn to in it.²²⁷ But the affidavit of an attorney, that from his client's statement of the case to him he believes that the client has a good and substantial defense upon the merits, is not sufficient.²²⁸ Nor is an affidavit which states that from an examination of the defendant's case, so far as he has made such examination, he verily believes that it is better than the plaintiff's.²²⁹ An affidavit of an attorney, upon information and belief, as to a defense on the merits, but containing no statement of the facts on which the same is based, and alleging as an excuse an unsuccessful search for the papers by a third person, who makes no affidavit to that effect, is insufficient.²³⁰

²²³ *Palmer v. Rodgers*, 70 Iowa, 381, 30 N. W. Rep. 645; *Lamb v. Nelson*, 34 Mo. 501; *Castlio v. Bishop*, 51 Mo. 162; *Foster v. Martin*, 20 Tex. 118; *Roberts v. Corby*, 86 Ill. 182; *Frost v. Dodge*, 15 Ind. 139; *Railroad v. Gates*, 23 Ind. 238; *Goldsberry v. Carter*, 28 Ind. 59.

²²³ *Burnham v. Smith*, 11 Wis. 258; *Woodward v. Backus*, 20 Cal. 137; *Reidy v. Scott*, 53 Cal. 69; *Francis v. Cox*, 83 Cal. 828.

²²⁴ *Morgan v. McDonald*, 70 Cal. 32, 11

Pac. Rep. 350; *Burnham v. Smith*, 11 Wis. 258.

²²⁵ *Goodhue v. Churchman*, 1 Barb. Ch. 596; *Winship v. Jewett*, 1 Barb. Ch. 178; *McGaffigan v. Jenkins*, 1 Barb. 31.

²²⁶ *Bailey v. Taaffe*, 29 Cal. 422.

²²⁷ *Francoviz v. Smith*, 35 Minn. 273, 28 N. W. Rep. 508.

²²⁸ *Stilson v. Rankin*, 40 Wis. 527.

²²⁹ *Bailey v. Taaffe*, 29 Cal. 422.

²³⁰ *Hitchcock v. Hertzner*, 90 Ill. 542.

§ 348. Meritorious Defense must be shown.

The defense, it is said, must be *meritorious*. By this we mean that it must be substantial and not merely technical, fair and honest and not unconscionable. It is considered in Pennsylvania that an application to open a judgment is in effect a demand for equitable relief, and the applicant must make out a case which would justify a chancellor in entering a decree.²⁹¹ Where the complaint, in an action to set aside a judgment, does not attempt to show that the plaintiff had or has any valid defense to the original action, a demurrer to the answer, whether good or bad, is properly overruled. "A bad answer is sufficient for a bad complaint."²⁹² In another case, where it was proposed to set aside a default and reinstate the case that the defendant might plead to the merits, and it appeared that substantially the same matters proposed to be pleaded had been determined against the defendant in a former litigation, it was held that the motion was properly denied.²⁹³ But where a default has been taken against a person upon whom there was no service of process, and over whom the court acquired no jurisdiction, he is entitled to have the judgment annulled without showing a meritorious defense to the action.²⁹⁴ A defendant who seeks to open a judgment which he has suffered voluntarily and under the advice of counsel, must show the court specifically in what his defense consists; general allegations will not suffice.²⁹⁵ But on a motion to open a default the court will not determine absolutely whether the defense interposed will be sufficient at the trial, but merely see that it is not frivolous. If set up in good faith, and with a sufficient excuse for the party's negligence in not having presented it at the proper time, he will be let in to answer as of course.²⁹⁶

²⁹¹ Knarr v. Elgren (Pa.), 9 Atl. Rep. 875.

²⁹² Rupert v. Martz, 116 Ind. 72, 18 N. E. Rep. 831.

²⁹³ Storey v. Weaver, 66 Ga. 296.

²⁹⁴ Dobbins v. McNamara, 118 Ind. 54, 14 N. E. Rep. 887.

²⁹⁵ Ellis v. Jones, 6 How. Pr. 296.

²⁹⁶ Commissioners v. Hollister, 2 Hilt. 588.

§ 349. Technical or Unconscionable Defense not Sufficient.

The privilege of vacating judgments is to be used only in the furtherance of justice, and a judgment should not be set aside unless it is unjust as it stands. Hence, if it is regular on its face, it will never be opened up merely for the purpose of letting in an unconscionable, dishonest, or purely technical defense.²⁹⁷ That *usury* is to be regarded as a defense of this character is settled beyond question. The court will not open a judgment merely to allow the plea of usury to be set up, or, if it opens the judgment on other grounds, may forbid the defendant to interpose that defense.²⁹⁸ In regard to a plea of the statute of limitations, there is room for more doubt. Some of the cases hold that such defense is not sufficient to justify the court in opening the judgment, at least if there is nothing to show that the debt is not still morally and honestly due.²⁹⁹ Indulgence, it is said, should not be granted for the defendant's laches merely to enable him to deny the like indulgence to the laches of his adversary. In Ohio the decisions are that this plea is one not to be favored, and where an issue has been made up, or the defendant is in default, he will not be allowed to put in the plea of the statute, unless under peculiar circumstances.³⁰⁰ But on the other hand, in some states it is held that the statute of limitations is a good and meritorious plea, that it is sufficient ground for opening the judgment, and that if the trial court refuses to set aside the judgment unless the defendant

²⁹⁷ *Parrott v. Den*, 84 Cal. 79; *Thatcher v. Haun*, 12 Iowa, 308; *Niagara Ins. Co. v. Rodecker*, 47 Iowa, 162; *Bank of Statesville v. Foote*, 77 N. Car. 181; *Mulholland v. Scroggin*, 8 Nebr. 202; *Anderson v. Beebe*, 22 Kans. 768; *Jorgensen v. Griffin*, 14 Minn. 464 (Gil. 346); *Pennington v. Gibson*, 6 Ark. 447; *Hazelrigg v. Wainwright*, 17 Ind. 215; *Marsh v. Lasher*, 18 N. J. Eq. 253; *Audubon v. Ins. Co.*, 10 Abb. Pr. 64; *Bard v. Fort*, 8 Barb. Ch. 632; *Gay v. Gay*, 10 Paige, 874; *Gourlay v. Hutton*, 10 Wend. 595.

²⁹⁸ *Farish v. Corlies*, 1 Daly, 274; *Lov-*

ett v. Cowman, 6 Hill, 226; *Candler v. Pettit*, 1 Paige, 427; *Marsh v. Lasher*, 18 N. J. Eq. 253; *Morris v. Slaterry*, 6 Abb. Pr. 74; *Grant v. McCaughin*, 4 How. Pr. 216; *Quincy v. Foot*, 1 Barb. Ch. 496; *Hazelrigg v. Wainwright*, 17 Ind. 215.

²⁹⁹ *Pennington v. Gibson*, 6 Ark. 447; *Hawes v. Hoyt*, 11 How. Pr. 434; *Haines v. Lytle*, 4 W. L. J. 1; *Douglas v. Douglas*, 8 Edw. Ch. 390.

³⁰⁰ *Sheets v. Baldwin's Admr.*, 12 Ohio, 120; *Newsom's Admr. v. Ran*, 18 Ohio, 240.

will agree to waive this defense, it is a manifest abuse of discretion.³⁰¹ A set-off may perhaps be considered, in some instances, as a meritorious defense within this rule, but a judgment should not be opened to the prejudice of the plaintiff merely to enable the defendant to interpose a counter-claim which he may enforce by action, where there is no doubt as to the plaintiff's responsibility.³⁰² So again, the court will not open up a default to permit a defense of the statute of frauds to be made either by demurrer or plea, unless under special and peculiar circumstances.³⁰³ In equity, a decree fairly and regularly obtained by default, for want of an answer, will not be set aside to let in a defense founded on a fraudulent speculation undeserving of the favor of the court.³⁰⁴ But on the other hand, the plea of *res judicata* is not a technical but a meritorious defense. To prohibit the defendant from pleading a former judgment in bar of the present action, as a condition to lifting the default against him, is error.³⁰⁵ And so, where the action is on a note, the defense that it was given for money lost in gaming is a defense to the merits, and should be allowed.³⁰⁶ In California, it is said that the statement that the defense appears on the face of the complaint, shows it to be of a technical character merely and therefore insufficient.³⁰⁷

§ 350. Opening Judgment to admit Defense.

In Pennsylvania, the usual and favorite practice, upon a proper and timely application for relief against a judgment by confession or default, is to *open* the judgment, but without vacating it and without impairing its lien, and let the defendant in to a defense on the merits.³⁰⁸ It is in the light of this statement that we are to understand the remark that to open a judgment is not to set it aside, and that when it is closed by the action of the court it takes its place as

³⁰¹ Ellinger's Appeal, 114 Pa. St. 505, 7 Atl. Rep. 180; Mitchell v. Campbell, 14 Oreg. 454, 18 Pac. Rep. 190. See also Gourlay v. Hutton, 10 Wend. 595.

³⁰² Lahey v. Kingon, 22 How. Pr. 209.

³⁰³ McCulloch v. Tapp, 4 West. L. M. 575.

³⁰⁴ Parker v. Grant, 1 Johns. Ch. 680.

³⁰⁵ Audubon v. Ins. Co., 10 Abb. Pr. 64.

³⁰⁶ Ruckman v. Pitcher, 1 N. Y. 892; Bank of Kinderhook v. Gifford, 40 Barb. 659; Grant v. McCaughin, 4 How. Pr. 216.

³⁰⁷ People v. Rains, 23 Cal. 127.

³⁰⁸ Cochran v. Eldridge, 49 Pa. St. 856.

if it had never been disturbed.³⁰⁰ Thus, for example, a judgment entered on a warrant of attorney should be opened to let the defendant plead his discharge in bankruptcy, when he acts immediately upon notice.³¹⁰ On opening a judgment, in accordance with this practice, the judgment itself may be regarded as standing in the place of a declaration, and the entry of a *non pros.* for want of a declaration is irregular.³¹¹ But the opening of the judgment leaves the burden and the mode of proof exactly the same as if the judgment had never been entered. Hence if the defendant pleads *non est factum* as to the instrument on which it was founded, the record of the judgment is not even *prima facie* evidence for the plaintiff.³¹² When a judgment is thus opened, the defenses which may be set up are limited. For instance, it does not become subject to set-off generally. If the defendant has a valid claim against the plaintiff exceeding the amount of the judgment, he cannot recover a verdict for the excess. He may be permitted to attack the validity of the claim on which the judgment is founded, or the good faith of the transaction connected with the consideration, or to show subsequent payment of the debt or equitable discharge therefrom. But in some manner, either in law or equity, the subject-matter of defense must have attached to the judgment or the consideration on which it rests.³¹³ The defendant can urge defenses existing at the time of the rendition of the judgment, but not those accruing subsequently.³¹⁴ If a judgment be opened upon an affidavit of defense, and the defendant let in to a defense upon the merits, he will not, upon the trial, be permitted to take advantage of a technical exception to the form of action.³¹⁵ And, generally, the rules stated in the preceding section will apply to this manner of practice. So where a judgment on a note is opened, with leave to the defendant to defend on matters stated in his petition, he cannot set up a breach of contract not alleged in the petition.³¹⁶

³⁰⁰ *Gloninger v. Hazard*, 4 Phila. 354.

³¹⁰ *Wise's Appeal*, 99 Pa. St. 198; *Adams's Appeal*, 101 Pa. St. 471.

³¹¹ *Bush v. Monteith*, 2 Week. Notes Cas. 112.

³¹² *West v. Irwin*, 74 Pa. St. 258; *Collins v. Freas*, 77 Pa. St. 493.

³¹³ *Beatty v. Bordwell*, 91 Pa. St. 433.

³¹⁴ *Curtis v. Slosson*, 6 Pa. St. 265.

³¹⁵ *Ekel v. Snevily*, 3 Watts & S. 272, 33 Am. Dec. 753.

³¹⁶ *Marsh v. Nordyke & Marmon Co.* (Pa.), 15 Atl. Rep. 875.

§ 351. Evidence.

In Georgia it is said that "a motion to set aside a judgment, like a motion to arrest it, must be based on some defect apparent on the face of the record. The two motions differ only in respect to the term in which each must be severally made."³¹⁷ But this is not the general rule or the general practice. Particularly when the proceeding is statutory, it is considered that the record may be attacked and contradicted, and the facts alleged as a reason for vacating the judgment may be established by any competent evidence. The court may hear any evidence which is calculated to aid it in reaching a conclusion, the rules of evidence not being so strictly adhered to as in the trial of an issue by a jury.³¹⁸ But the party must establish his right to such relief by clear and convincing proof.³¹⁹ Affidavits in support of the motion and in opposition thereto are admissible for either party, as well as oral testimony or depositions. But counter-evidence will not be heard in any form as to the matters alleged as constituting a defense to the original action.³²⁰ In other words, upon a motion to set aside a judgment, the only issue is as to whether the judgment was entered fraudulently, irregularly, or improvidently, or through the "mistake, inadvertence, surprise, or excusable neglect" of the defendant, and whether the motion is made properly and in time. And to these points the evidence must be confined. The affidavit of merits cannot be contradicted. If it is inquired into at all, it is only to ascertain whether the facts stated in it, *assuming their truth*, constitute a good and meritorious defense. Those facts must of course be proved on the subsequent trial, but they are not in issue on the motion to vacate the judgment.

³¹⁷ Pulliam v. Dillard, 71 Ga. 598.

³¹⁸ Gay v. Grant (N. Car.), 8 S. E. Rep. 99; Shortz v. Quigley, 1 Binn. 222; McKinley v. Tuttle, 84 Cal. 235.

³¹⁹ Smith v. Black, 51 Md. 247.

³²⁰ Buck v. Havens, 40 Ind. 221; Hill v. Crump, 24 Ind. 271; Pratt v. Keils, 28 Ala. 390; Francis v. Cox, 33 Cal. 323; Gracier v. Weir, 45 Cal. 58.

§ 352. Imposition of Terms.

Since the opening or vacating of a judgment, in any case where an imputation of laches or inattention rests upon the party applying, is an act of grace and favor and is discretionary with the trial court, it has power to impose such terms as may be just and reasonable, as a condition to the granting of such relief, and its action in this respect will not be interfered with, unless for a gross and manifest abuse of discretion.³²¹ The most usual application of this power of imposing terms is the requirement that the party pay all previous costs in the action as a condition precedent to the opening of the judgment. Indeed this is so commonly done, in practice, as to have become almost a matter of course.³²² Yet it is not a legal necessity. It is equally in the discretion of the court, if it considers such action just and proper in the particular case, to omit this requirement. Thus an order vacating a judgment, on account of surprise or excusable neglect, need not require the payment of all costs as a condition precedent.³²³ Another very common requirement is, that the party shall plead to the merits, or shall forbear to set up some particular defense which is considered unconscionable or purely technical. "No judgment ought to be opened without imposing terms which would forbid advantage to be taken of a mere technical error. A party has no right to a hearing after judgment, except for causes which touch the honesty and justice of the cause."³²⁴ By referring to a former section,³²⁵ the reader will see what species of defenses have been adjudged meritorious, within the meaning of this rule, and what technical or dishonest. Other conditions than those mentioned are less frequently employed, but generally

³²¹ *Ensly v. Wright*, 3 Pa. St. 501; *McMurray's Heirs v. Erie*, 59 Pa. St. 223; *Huston Township Ins. Co. v. Beale*, 110 Pa. St. 321, 1 Atl. Rep. 926; *Fowble v. Walker*, 4 Ohio, 64; *Hovey v. Middleton*, 56 Ill. 468; *Mason v. McNamara*, 57 Ill. 274; *Young v. Bircher*, 31 Mo. 136, 77 Am. Dec. 638; *Magoon v. Callahan*, 39 Wis. 141; *Howe v. Coldren*, 4 Nevad. 171.

³²² *Howe v. Independence Co.*, 29 Cal. 72; *Leet v. Grant*, 36 Cal. 288; *Bailey v. Taaffe*, 29 Cal. 422; *People v. O'Connell*, 23 Cal. 281; *Roland v. Kreyenhagen*, 18 Cal. 455.

³²³ *Ryan v. Mooney*, 49 Cal. 83. And see *Robinson v. Merrill* (Cal.), 22 Pac. Rep. 260.

³²⁴ *Bailey v. Clayton*, 20 Pa. St. 295.

³²⁵ *Supra*, § 349.

the terms to be imposed rest in the discretion of the court, as it may be guided by the circumstances of the individual case. In a recent litigation it was held that, upon the facts of the case, an order granting leave to answer upon condition that the defendant consent to the appointment of a receiver of the property in question, pending the trial and determination of the issues raised by the answer, was not an abuse of discretion.³²⁶ If it seems proper and necessary, the court may require the defendant to give security for the payment of the sum that may ultimately be recovered against him, or may order that the judgment itself stand as security. But where, upon an application by non-resident defendants for an order opening a judgment taken against them by default and for leave to answer, they presented a meritorious case for relief, but the court required, as a condition, that they file a bond with resident sureties, to be approved by the court, in a sum sufficient to secure the payment of the amount of such judgment as the plaintiffs might recover, this requirement was held to be an abuse of the discretion of the court.³²⁷ It is to be noted that a judgment ordered to be set aside "on payment of all costs" remains in full force until such payment is made.³²⁸ And so, if an order is made setting aside a judgment and default on condition that the moving party pay to the other a sum of money, and serve and file an answer within a certain time, the conditions must be complied with within the time fixed, or the judgment will remain in force in the same manner as if the order setting it aside had not been made.³²⁹

§ 353. Partial Vacation of Judgment.

Where a judgment is rendered on a petition which contains two distinct causes of action, though not separately stated and numbered, but united in a single count, and a motion is made to vacate and set aside the judgment and grant a new trial for defects apparent in the record, and the record discloses that judgment was properly entered

³²⁶ *Exley v. Berryhill*, 36 Minn. 117, 30 N. W. Rep. 436.

³²⁷ *Brown v. Brown*, 37 Minn. 128, 33 N. W. Rep. 546. See also *Union Nat.*

Bank v. Benjamin, 61 Wis. 512, 21 N. W. Rep. 523.

³²⁸ *Gregory v. Haynes*, 21 Cal. 443.

³²⁹ *Hartman v. Olvera*, 49 Cal. 101.

on one cause of action and improperly entered on the other, it is held that the court will commit no error in sustaining the motion in part and vacating the judgment as to the one cause of action, while at the same time it overrules the motion in part and refuses to disturb the judgment in respect to the other cause of action.³³⁰

§ 354. Allowance of Application discretionary.

A motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case, and its action in the matter, whether of allowance or refusal, will not generally be disturbed by the appellate court, unless there has been a manifest abuse of such discretion.³³¹ The *nature* of this discretion has been described, in a well-considered opinion of the supreme court of California, in terms which would probably be accepted as accurate and reasonable in all jurisdictions. "The discretion intended," says the court, "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be

³³⁰ *Weaver v. Leach*, 26 Kans. 179.

³³¹ *Eldred v. Hazlett*, 88 Pa. St. 16; *Gilliland v. Bredin*, 68 Pa. St. 398; *Lamb's Appeal*, 89 Pa. St. 407; *Sweezy v. Kitchen*, 80 Pa. St. 160; *McClelland v. Pomeroy*, 75 Pa. St. 410; *Hudgins v. White*, 65 N. Car. 398; *Elliston v. Bank*, 8 Dana, 99; *Merritt v. Putnam*, 7 Minn. 498; *Seymour v. Supervisors*, 40 Wis. 62; *Wheeler & Wilson Manuf. Co. v. Monahan*, 68 Wis. 194, 23 N. W. Rep. 109; *Dougherty v. Nevada Bank*, 68 Cal. 275, 9 Pac. Rep. 112; *White v. Northwest Stage Co.*, 5 Oreg. 99. See *Cavanaugh v. Railroad*, 49 Ind. 149. "The exercise of jurisdiction upon rules to open judgments

entered on warrants of attorney has always been held to be within the sound discretion of the courts. The act of April 4, 1877, which provides for an appeal to this court, has not changed the law in that respect. It provides only that the decision 'shall be reviewed by appeal in like manner and proceedings as equity cases are now appealed.' It is a mistake to suppose that the court cannot judge of the weight of the evidence and the credibility of witnesses, but must in every case, where there is a conflict of testimony, send the case to the jury." *Earley's Appeal*, 90 Pa. St. 822; *Wernet's Appeal*, 91 Pa. St. 319.

doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merits *in foro legis*, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other."³³² It is also said, however, that as a general rule, in a doubtful case, the court should incline to relieve. The exercise of the court's discretion ought to tend in a reasonable degree to bring about a judgment on the merits of the case, and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a rule, that the doubt should be resolved in favor of the application, proper terms and conditions being imposed.³³³ A doubt as to the propriety of allowing the motion may arise from the nature of the evidence or the fact of its being evenly balanced. Thus, where the oath of the petitioner is opposed by the oath of the plaintiff in the judgment, it is no abuse of discretion to refuse to open the judgment.³³⁴ But if the relief is accorded, it will be presumed, in the court above, that there was sufficient evidence to justify the order.³³⁵ Where the situation of the judgment-creditor has undergone a material change, as by the incurring of expense in issuing and levying execution, and by the fact that a material witness has, by the death of the judgment debtor, become disqualified, there is no abuse of discretion in refusing to open the judgment.³³⁶ In Missouri it is said that "while this court will not interfere with the discretion of the trial court in refusing to vacate and set aside a judgment where there is a conflict of evidence, it will do so when the evidence is all on one side and it is clear that the discretion has been abused."³³⁷ In Wisconsin, the area of the court's discretion appears to be more contracted. It is said that "unless the default of the party is excused and a verified answer

³³² *Bailey v. Taaffe*, 29 Cal. 422.³³³ *Watson v. San Francisco & H. B. R. Co.*, 41 Cal. 17.³³⁴ *Barton's Appeal* (Pa.), 7 Atl. Rep. 168.³³⁵ *Willett v. Millman*, 61 Iowa, 123, 15 N. W. Rep. 866.³³⁶ *Jefferson Co. Bank v. Robbins*, 67 Wis. 68, 29 N. W. Rep. 893.³³⁷ *Craig v. Smith*, 65 Mo. 586.

tendered showing a defense on the merits," the appellate court will not interfere with a refusal to open the judgment.³³⁸ A court having jurisdiction to set aside a judgment has the right to give any less relief by which justice may be obtained and by which the rights of a party in excusable default may be protected, and the mode of effecting this object is under the control and subject to the discretion of the court.³³⁹ In California the trial court has no power to review its own order setting aside a judgment for want of service of summons, where the order was regularly made after hearing and consideration.³⁴⁰ According to the practice in some of the states, the refusal of the court below to open a judgment is ground for an appeal, but cannot be brought up on writ of error.³⁴¹

§ 355. Effect of Vacating Judgment.

If a judgment is absolutely void and a mere nullity, of course it is no protection or justification to any person, and it is immaterial whether it be set aside or not. But if it is voidable only, and not void, it seems clear, as a matter of legal reason, that acts done under it by the plaintiff or others ought not to be invalidated by its subsequent vacation, *provided* that the reason for setting it aside be not attributable to the plaintiff, but the relief be granted as a matter of grace and favor to the defendant and on account of his mistake or excusable neglect. On the other hand, if the judgment is to be vacated by reason of the fraud or misconduct of the plaintiff, or for any irregularity for which he is actually or constructively to blame, it is equally clear that he should not be permitted to justify under it. And herein there is an important difference between the setting aside of an irregular judgment and the reversal of an erroneous judgment. "Although a void judgment, or one that is voidable for irregularity, will not, after being set aside, justify the acts of the party done under it before it was set aside, this principle has never been

³³⁸ *Union Lumbering Co. v. Supervisors*, 47 Wis. 245, 2 N. W. Rep. 281.

³³⁹ *McCall v. McCall*, 54 N. Y. 541.

³⁴⁰ *Hanson v. Hanson* (Cal.), 20 Pac. Rep. 736.

³⁴¹ *Gillespie v. Campbell* (Pa.), 1 Atl. Rep. 665.

applied to a judgment merely erroneous and reversed for error by a court of review. An irregular judgment is called voidable, and when set aside is treated as though void from the beginning; for the party himself is held chargeable with the irregularity; while a judgment pronounced by the court, although upon an erroneous view of the law, and subject therefore to be reversed by an appellate tribunal, is never treated as void, but valid for all purposes of protection to the party acting under it before reversal. The fact that in the one case the party is responsible for the irregularity, and in the other whatever of error there is in the judgment is the error of the court, seems to be the ground of distinction between the two, and it is manifestly a just and proper distinction. While it may well be held that a party is not justified by a judgment which is subsequently set aside for an irregularity in entering it up, it would seem unjust to hold that a judgment duly rendered by the court shall fail to protect a party acting under it before reversal, because reversed for error committed by the court."³²² Under the Pennsylvania practice, as already explained,³²³ an order opening a judgment and letting the defendant in to a defense, does not destroy the lien from the date of its original entry.³²⁴

³²² *Simpson v. Hornbeck*, 8 Lans. 58.

³²³ *Supra*, § 350.

³²⁴ *Steinbridge's Appeal*, 1 Pen. & Watts, 481.

CHAPTER XV.**RELIEF IN EQUITY AGAINST JUDGMENTS AT LAW.****PART I. JURISDICTION OF EQUITY TO ENJOIN THE ENFORCEMENT OF JUDGMENTS.**

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PART I. JURISDICTION OF EQUITY TO ENJOIN THE ENFORCEMENT OF JUDGMENTS.

§ 356. Origin of the Power.

The power and jurisdiction of the courts of equity to enjoin a party from enforcing a judgment which he has obtained, when it would be against conscience to permit him to do so, is at the present day so firmly established, so salutary in its operation, and so thoroughly in accord with the promptings of justice, that it is difficult to realize the stubbornness and bitter jealousy with which the beginnings of its exercise were resisted. That such was the fact, however, is fully certified by the historians. This species of jurisdiction "was one of the first subjects that engaged the attention of the English chancellors, and though violently resisted by common-law lawyers and judges, the power was largely exercised by Cardinal Wolsey in the reign of Henry VIII, and, according to Mr. Reeves, with great ability and justice. It is related of Sir Thomas More, who succeeded Cardinal Wolsey, that having invited the judges to dine with him, he showed them the number and nature of the causes in which he had granted injunctions to judgments of the courts of common law, and the judges, upon full debate of the matter, confessed that they could have done no otherwise themselves. Still, however, clamors against the equity jurisdiction continued until they culminated in the famous controversy in the reign of James I, which was conducted principally by Lord Coke against, and by Lord Ellesmere in favor of, the chancery jurisdiction. The very point of this controversy, according to Judge Story (1 Story's Eq. § 51), was whether a court of equity could give relief from or against a judgment at common law, and it was finally decided in favor of the equity jurisdiction.¹ From that time down to this day the jurisdiction has

¹Spence, Chanc. Jur. p. 674.

been exercised in England, and decrees of ecclesiastical courts have often been relieved against on the ground of fraud;² and so in like manner have awards,³ and verdicts,⁴ and judgments at law.⁵ And even decrees in chancery may be avoided for the same cause."⁶ Nor have the improvements of the law or the changes in judicial organization superseded this power of equity or obviated the necessity of its occasional exercise. A recent decision of the supreme court of the United States declares that the appropriate remedy to set aside or enjoin the execution of judgments at law wrongfully obtained is by bill in equity.⁷ But this jurisdiction, though unquestioned, is one which, from the pressure of hardship, always an element in these cases, is liable to abuse; and the abuse of it, say the courts, is extremely mischievous, tending as it does to conflict between jurisdictions and to the promotion of needless litigation.⁸ Hence "bills seeking relief from final judgments, solemnly rendered in the due and ordinary course of administration of justice by courts of competent jurisdiction, are always watched by courts of equity with extreme jealousy, and the grounds upon which interference will be allowed are, confessedly, narrow and restricted."⁹

§ 357. Nature of Relief granted.

The action of a court of equity in giving relief against a judgment at law is almost always indirect. Courts of chancery, it must be remembered, do not claim to exercise any supervisory power over the courts of law, or their proceedings. Judgments are not reversed or vacated in equity. Adjudications at law are not overhauled or re-examined. It is to the party himself that the energies of the court of equity are directed, and its remedial power is

² *Van Brough v. Cock*, 1 Chanc. Cas. 201; *Bissel v. Axtell*, 2 Vern. 47.

³ *Lonsdale v. Littledale*, 2 Ves. 451.

⁴ *Williams v. Lee*, 8 Atk. 228; *Bateman v. Willoe*, 1 Sch. & Lef. 201.

⁵ *Barnsley v. Powell*, 1 Ves. Sen. 119; *Gainsborough v. Gifford*, 2 P. Wms. 424; *Humphreys v. Humphreys*, 8 P. Wms. 394.

⁶ *Cochran v. Eldridge*, 49 Pa. St. 365, 368, citing *Lloyd v. Mansell*, 2 P. Wms. 73; *Galley v. Baker*, Cas. t. Talbot, 201; *Bradish v. Gee*, Amb. 229.

⁷ *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. Rep. 901.

⁸ *Kersey v. Rash*, 3 Del. Ch. 321.

⁹ *Johnson v. Templeton*, 60 Tex. 233.

exercised by putting restraint upon his usual liberty of following up his judgment by the appropriate process for its collection. Equity therefore acts on the *person*, not the proceeding; and while it will enjoin the *enforcement* of a judgment, in proper cases, it will not interfere with the judgment itself.¹⁰ Some of the cases hold that a court of equity cannot set aside the judgment of a law court and award a new trial. And indeed this is rarely done, if ever, in express terms; but the same end is effected by decreeing that unless the party *consents* to have the judgment set aside and a new trial had, he shall be perpetually enjoined from collecting his judgment.¹¹ But cases sometimes arise where the right to move for a new trial at law was lost, or an application was refused, in consequence of some of the circumstances which equity always regards as sufficient warrant for its interference. In such instances, the complainant being in no fault, it is generally considered to be within the power of equity to grant a new trial.¹² Thus relief of this character may be granted where the judgment is against conscience, and the applicant had no opportunity to make defense, or was prevented from defending by accident, or the fraud or improper management of the adverse party, and without fault on his own part.¹³ There is much learning in the books on this point, but it is merely collateral to our present subject and belongs more properly to a treatise on equity. A few words must be added as to the measure of the relief granted. It should always be adjusted to the exigencies of the particular case. If it is claimed that the judgment at law is *excessive*,—either because of the fraud or unfair

¹⁰Yancey v. Downer, 5 Litt. 8, 15 Am. Dec. 85; Richardson v. Baltimore, 8 Gill, 438; Contee v. Cooke, 2 Har. & J. 179; Blight v. Tobin, 7 T. B. Mon. 612, 18 Am. Dec. 219; Farmers' Bank v. Collins, 18 Bush, 188. On a bill filed by a defendant at law, on the ground that the subject is a trust and proper for equitable cognizance, an injunction ought not to be granted staying the trial at law, but only execution on the judgment which may be recovered. Justice v. Scott, 4 Ired. Eq. 108.

¹¹Pelham v. Moreland, 11 Ark. 448; Lawless v. Reese, 8 Bibb, 486; Gainty v. Russell, 40 Conn. 450; Yancey v. Downer, 5 Litt. 8, 15 Am. Dec. 85.

¹²Knifong v. Hendricks, 2 Gratt. 212, 44 Am. Dec. 385; Carter v. Bennett, 6 Fla. 214; Hoskins v. Hattenback, 14 Iowa, 314; Land v. Elliott, 1 Sm. & Mar. 608; Howe v. Martell, 28 Ill. 445; Deputy v. Tobias, 1 Blackf. 811, 12 Am. Dec. 248.

¹³Carrington v. Holabird, 17 Conn. 580.

dealing of the other party, or in consequence of a mistake or miscalculation,—that is no ground for enjoining the whole judgment. The creditor should merely be prohibited from proceeding to collect the excess.¹⁴ So where the execution of a judgment has been enjoined, and the defendant, upon being interrogated, admits a partial payment of such judgment, the injunction should be perpetuated for the amount admitted to have been paid, and dissolved as to the remainder still due.¹⁵

§ 358. What Adjudications subject to the Power.

Generally speaking, all judgments rendered or purporting to be rendered by courts of law are subject to the equitable power here considered. As to the particular case of a judgment that is absolutely void, however, the authorities do not agree. Some of the decisions hold that the defendant in a judgment cannot have equitable relief against it because it is either erroneous or void, since, if void, it may be disregarded or may be set aside on motion, and if erroneous it may be revised on appeal.¹⁶ There is much to be said in favor of this view, especially in contemplation of the known reluctance of equity to interfere if any adequate remedy offers itself at law. If the judgment is merely void, a sale under it would be a nullity. The purchaser would take no title, and the officer would be liable as a trespasser. Still, in some of the states, a bill for an injunction is considered the appropriate method for obtaining relief even against a void judgment, and this practice has become fully established by the rulings of the courts.¹⁷ An injunction will lie to prevent the collection of a judgment which has been vacated or set aside by the court which rendered it.¹⁸ And an execution issued on a judgment the record of which has been destroyed, there being no renewal by

¹⁴ *Hale v. Bozeman*, 60 Miss. 965; *Booth v. Kesler*, 6 Gratt. 350; *Barrow v. Robichaux*, 14 La. Ann. 207.

¹⁵ *Perry v. Kearney*, 14 La. Ann. 400. And see *Kamm v. Stark*, 1 Sawy. 547.

¹⁶ *Murphree v. Bishop*, 79 Ala. 404; *Lockridge v. Lyon*, 68 Ga. 187; *Sanches v. Camaja*, 81 Cal. 170; *St. Louis & C. R.*

Co. v. Reynolds, 89 Mo. 146, 1 S. W. Rep. 208.

¹⁷ *Glass v. Smith*, 66 Tex. 548, 2 S. W. Rep. 195; *Smith v. Deweese*, 41 Tex. 595; *Cooke v. Burnham*, 83 Tex. 129; *Chambers v. Hodges*, 28 Tex. 110; *Hernandez v. James*, 28 La. Ann. 488.

¹⁸ *Ricketts v. Hitchens*, 34 Ind. 343.

substitution, will be enjoined.²⁰ But in the case of a judgment on a promissory note which was given solely for the purpose of testing, by a collusive action, whether the maker had any title in property held in trust for his wife, the chancery court refused to interfere, because the whole proceeding was "an abuse of legal process and a fraud on the law."²¹ A judgment by *scire facias* is of the same force as any other, and while it may be enjoined in a proper case, the defendant is not entitled to any greater indulgence, in respect to his own neglect or omission, than in any other case.²² It is also held that a court has power to enjoin the collection of a judgment which it had power to render, although, by reason of the accrued interest and costs, the amount exceeds the limit of original jurisdiction.²³ As a general rule, equity will not re-examine and readjust settlements which have been made by compromise judgments in courts of law having jurisdiction of the subject-matter. Yet a compromise judgment, if obtained by fraud, accident, or mistake, may be relieved against by injunction.²⁴ There is also undoubted jurisdiction in equity to set aside an *award*, if good and equitable reasons are presented for such action.²⁵ But a bill will not lie to vacate an award on the ground of mistake on the part of the arbitrators or failure to determine all the matters submitted; for these matters may be pleaded in defense to an action at law on the award.²⁶ Where, under a code practice, decrees are to be enforced by execution in the same manner as judgments at law, an injunction may be granted, if otherwise proper, to restrain the execution of a decree.²⁷

§ 359. What Parties may Apply.

As a rule, relief in equity against a judgment at law is given only to the parties to the action,²⁸ or their privies,²⁹ or those whose rights

²⁰ *Cyrus v. Hicks*, 20 Tex. 483.

²¹ *Wells v. Smith*, 13 Gray, 207, 74 Am. Dec. 681.

²² *Thompson v. Hammond*, 1 Edw. Ch. 497.

²³ *Davis v. Davis*, 10 Bush, 274.

²⁴ *Hahn v. Hart*, 12 B. Mon. 496.

²⁵ *Milnor v. Railroad*, 4 Ga. 385.

²⁶ *Mickles v. Thayer*, 14 Allen, 114.

²⁷ *Oro Fino Co. v. Cullen*, 1 Idaho Ter. 126.

²⁸ *Mayes v. Woodall*, 35 Tex. 687;

Marriner v. Smith, 27 Cal. 649.

²⁹ *Bullock v. Winter*, 10 Ga. 214.

are directly affected by the judgment. Thus, one who has purchased land subject to the lien of a judgment cannot go into equity to enjoin the judgment, his grantor making no objection to it, unless he can show that it was founded in fraud and expressly designed to injure him in his rights as a purchaser.²⁹ So an execution in ejectment will not be restrained at the instance of a stranger holding a paramount title, for if his title is good the judgment does not affect him.³⁰ Nor will an injunction be granted to restrain execution-creditors from proceeding to sell the property of their debtor, on the ground that certain claims to the property have been interposed, casting a cloud upon the title, and rendering it probable that the property will bring less than its value, to the injury of other creditors of the same debtor, the debtor being insolvent.³¹ A stranger to an execution, whose goods have been levied on under it, cannot have an injunction on the ground that the judgment was erroneous; for he has a good remedy at law.³² But on the other hand, it has been held that where a judgment-creditor may collect from property that his debtor has not conveyed, but refuses or fails to do so, he may be enjoined from proceeding against the debtor's grantee.³³ It is certainly clear that a third person may maintain an action to perpetually enjoin the enforcement of a judgment which was procured through fraud and for the purpose of defrauding him.³⁴ And in some states it has been held that where a judgment is entered by confession without action, unless the statute authorizing such entry has been substantially complied with, the enforcement of the judgment may be enjoined, upon principles of equity, at the suit of a third party prejudiced thereby.³⁵ If the applicant is in privity of interest or estate with the defendant, he is of course not regarded as a stranger to the action, and his right to interfere is more easily established. Thus, where a suit was brought in Massachusetts against a corporation on a judgment rendered in

²⁹ *Marriner v. Smith*, 27 Cal. 649; *Shufelt v. Shufelt*, 9 Paige, 187; *French v. Shotwell*, 6 Johns. 235.

³⁰ *Harper v. Hill*, 85 Miss. 63. And see *Whitman v. Willis*, 51 Tex. 429.

³¹ *Robinson v. Thompson*, 30 Ga. 933.

³² *Markley v. Rand*, 12 Cal. 275.

³³ *Hurd v. Eaton*, 28 Ill. 123.

³⁴ *Busenbark v. Busenbark*, 33 Kana. 572, 7 Pac. Rep. 245.

³⁵ *Schuster v. Rader* (Colo.), 22 Pac. Rep. 505.

New York, and no defense had been made by the company in the latter state, a temporary injunction was granted restraining the suit on a bill filed by an individual stockholder.³⁶ A judgment at law against two defendants may be annulled by a decree of a court of chancery as to one and remain binding as to the other.³⁷ But if the bill is filed by one defendant alone, the other should be made a party to the action, unless sufficient reasons for the omission be stated.³⁸ And where a separate judgment is rendered against each of two joint wrong-doers, neither judgment can be perpetually enjoined while both remain in force and unsatisfied, although one of such judgments has been assigned by the holder to a third person.³⁹ Since the sovereign is beyond the reach of any prohibitory process, it follows that an injunction cannot be issued to restrain the United States from collecting a judgment in its favor.⁴⁰

§ 360. What Courts Exercise the Power.

The enjoining of a judgment at law is a purely equitable remedy. But it is not necessary for its exercise that the tribunal should be distinctively and individually organized as a chancery court. This power is habitually brought into play in those states where, for want of separate equity courts, the law courts apply equitable remedies. And even under the codes, where law and equity are fused, equitable jurisdiction, equitable proceedings, and equitable remedies are not abolished, although metamorphosed as to their external appearance. Questions as to the power to enjoin judgments most commonly arise between co-ordinate courts. Thus in Tennessee it is held that one chancery court may enjoin execution of a judgment wrongfully taken in another chancery court.⁴¹ But in another state, it is held that one circuit court has no jurisdiction of an action to annul and enjoin the judgment of another circuit court.⁴² In Iowa, an execution issued upon a judgment of the supreme court may be enjoined by the dis-

³⁶ *Sumner v. Marcy*, 3 Wood. & M. 105.

³⁷ *Kennedy v. Evans*, 31 Ill. 253.

³⁸ *Gates v. Lane*, 44 Cal. 392.

³⁹ *Meixell v. Kirkpatrick*, 25 Kans. 19.

⁴⁰ *Hill v. United States*, 9 How. 386.

⁴¹ *Douglass v. Joyner*, 57 Tenn. 33.

⁴² *Plunkett v. Black*, 117 Ind. 14, 19 N. E. Rep. 537.

strict court of the county in which it is sought to be enforced.⁴³ The federal courts are prohibited by statute from granting writs of injunction to stay proceedings in any of the state courts.⁴⁴ And conversely, the state courts cannot restrain an action in any of the federal courts, or enjoin the collection of an execution issued from any of such courts.⁴⁵

§ 361. Concurrent Remedies.

Embarrassing questions sometimes arise as to the right and power of equity to interfere by injunction against a judgment while the party has a concurrent and equally efficacious remedy by application to the court which rendered the judgment, or by appeal to a higher court. The general rule, however, as established by the best authorities, is that the party seeking relief must have exhausted all his resources at law, for equity will not grant an injunction where there is an adequate remedy at law.⁴⁶ Nor will the court grant an injunction to stay proceedings in another court having the same power to grant relief.⁴⁷ But the remedy at law, though adequate to the case, may have been lost through circumstances not attributable to the neglect or fault of the party seeking relief. In such instances, all question as to the right of equity to lend its aid is at once removed. Thus, where there are statutes authorizing the law courts to grant relief from their judgments in certain cases, this will not preclude a party, in a proper case, from obtaining relief in equity after the time limited for applying for relief under those statutes has elapsed, provided sufficient reasons are shown for not having made such application in time.⁴⁸ If, for example, the judgment was fraudulently and secretly entered up, and the defendant had no notice or knowledge of its existence until after the expiration of the time within which he

⁴³ *Massie v. Mann*, 17 Iowa, 181.

⁴⁴ 1 U. S. Stat. at Large, 385.

⁴⁵ *Riggs v. Johnson Co.*, 6 Wall. 166; *United States v. Keokuk*, 6 Wall. 514; *Strozier v. Howes*, 80 Ga. 578; *English v. Miller*, 2 Rich. Eq. 820; *Coster v. Griswold*, 4 Edw. Ch. 384.

⁴⁶ *Wilkinson v. Rewey*, 59 Wis. 554,

18 N. W. Rep. 518; *Crandall v. Bacon*, 20 Wis. 639; *Bibend v. Kreutz*, 20 Cal. 109; *Hart v. Lazaron*, 46 Ga. 396.

⁴⁷ *Grant v. Quick*, 5 Sandf. 612; *Dufossat v. Berens*, 18 La. Ann. 339.

⁴⁸ *District Twp. of Newton v. White*, 42 Iowa, 608; *Baker v. Riordan*, 3 West C. Rep. 210.

might have moved the law court to vacate it, it is a case for equitable interference, merits being shown.⁴⁰

§ 362. Same; Relief on Motion.

The liberal practice of the courts in granting new trials and entertaining motions to vacate or open their own judgments, and the enactment of statutes in many of the states authorizing the setting aside of judgments taken against a defendant "through his mistake, inadvertence, surprise, or excusable neglect," have considerably abridged the province of equity in giving relief by injunction. And the rule is generally adhered to, as the more safe and conservative principle, that equity will not grant relief against an execution if the party can equally well be relieved, on motion, in the court which issued the execution or has control of it.⁴¹ It is true that some cases maintain a different view, holding that although the judgment might be vacated or set aside on motion, and although the time for so moving has not yet expired, still equity may enjoin the enforcement of the judgment.⁴² But in so holding they depart from the fundamental principles of equity and are not to be commended. If the time limited by law for seeking relief in the law court has already expired, without the neglect or fault of the party, that, as stated in the preceding section, is a different matter, and the right of equity to interfere is unquestioned. It has been held that the summary refusal of a motion for a new trial or for the vacation of the judgment will not prevent the party from coming into equity with a bill for an injunction, based on the same grounds.⁴³ But the weight of authority is against this proposition. The best cases hold that equity will refuse to act by

⁴⁰ *Spooner v. Leland*, 5 R. I. 848.

⁴¹ *Imlay v. Carpentier*, 14 Cal. 173; *Bibb v. Kreutz*, 20 Cal. 109; *Logan v. Hillegass*, 16 Cal. 201; *Hintrager v. Sumbargo*, 54 Iowa, 604, 7 N. W. Rep. 92 (compare *Connell v. Stelson*, 38 Iowa, 147); *Hart v. Lazon*, 46 Ga. 396. A party claiming that he had not been credited by the sheriff for all the money he had paid to him upon an execution,

is not entitled to an injunction and relief in equity, as the court issuing the execution may be applied to to remedy the injustice complained of. *Morrison v. Speer*, 10 Gratt. 228.

⁴² *Landrum v. Farmer*, 7 Bush, 46; *Hernandez v. James*, 23 La. Ann. 484; *Caruthers v. Hartsfield*, 8 Yerg. 366, 24 Am. Dec. 580.

⁴³ *Simpson v. Hart*, 14 Johns. 68.

injunction when the grounds alleged have already been considered and held insufficient on a motion at law; in such case the whole matter is *res judicata* and equity will not re-open it.⁵³ To show the disposition of the chancery courts in this regard, we cite the case of *Dalhoff v. Keenan*,⁵⁴ where it appeared that the party had filed his petition for a new trial in the law court within the time prescribed by the code, alleging that the judgment was fraudulent, but this petition was dismissed because a necessary witness was absent and because the other party promised that he would make "a fair offer of compromise," and afterwards the complainant brought an action in equity to set aside the judgment and for a new trial of the issues. But it was held that the action in equity was properly dismissed, because the complainant had an adequate and speedy remedy at law, which he had begun to pursue but had improvidently abandoned.

§ 363. Same; Appeal or Error.

In pursuance of the same general principle, the party must have exhausted his possible remedies by appeal or writ of error before equity will hear him. If, by failing to appeal, or by prosecuting an appeal in a defective or insufficient mode, he loses his remedy at law, he cannot proceed in equity by injunction, unless new and sufficient equities be alleged.⁵⁵ Nor will a judgment be enjoined when the complainant has neglected to except to it as he might have done.⁵⁶ So a judgment which is not appealed from, and which directs a forced sale of articles for its satisfaction which are by law exempt from forced sale, is not a nullity, however erroneous; and when no means have been used to correct the error by appeal, the conclusive force of the judgment cannot be evaded by a resort to injunction.⁵⁷ Nor is the death of a party before judgment sufficient ground for an injunc-

⁵³ *Matson v. Field*, 10 Mo. 100; *Davis v. Bass*, 4 Ind. 813; *Collins v. Butler*, 14 Cal. 223; *Critchfield v. Porter*, 3 Ohio, 518; *Gray v. Barton*, 63 Mich. 186, 28 N. W. Rep. 818.

⁵⁴ 66 Wis. 679, s. c. 24 N. W. Rep. 273.

⁵⁵ *Long v. Smith*, 89 Tex. 160; *Brum-*

baugh v. Schmebly, 2 Md. 320; *Palmer v. Malone*, 1 Helsk. 549; *James v. Neal*, 3 T. B. Mon. 369; *Flanneken v. Wright*, 64 Miss. 317, 1 South. Rep. 157.

⁵⁶ *Dibble v. Truluck*, 12 Fla. 185.

⁵⁷ *Rountree v. Walker*, 46 Tex. 200.

tion; the proper remedy is by error *coram nobis*.⁶⁰ In a case where judgment was rendered by a court of competent jurisdiction, and a case was made by the defeated party for the purpose of review in the appellate court, and the successful party wrongfully obtained possession of such case-made, and withheld it until the time had elapsed within which by statute a judgment could be reviewed above, it was held that the defeated party could not have an injunction against the collection of the judgment. For, said the appellate tribunal, his remedy is by petition in error in this court, and then if it appears that he was prevented from bringing the case here solely by the wrongful conduct of the opposing party, and he has himself been guilty of no laches, this court will entertain jurisdiction and examine the record as though it had been filed in time.⁶¹ But if a meritorious bill of exceptions be dismissed because of a mistake made by the certifying judge, and without the fault of counsel, equity may restrain the enforcement of the judgment thus affirmed until the matters set up in the dismissed bill of exceptions can be heard.⁶² And *a fortiori*, equity will relieve against a judgment where the law-judge refused to sign a bill of exceptions and the exceptions were such as should have been sustained.⁶³ In Illinois an extremely liberal practice appears to obtain. For it is held that relief may be obtained against a judgment, on the ground of fraud, although the party might find a remedy in a court of law, and even if the party had notice of the judgment in time to appeal, and made an abortive attempt to do so, this does not prevent him from applying to a court of equity for relief.⁶⁴

§ 364. Same; Cross-Actions and Actions over.

In a number of instances courts of equity have refused to enjoin the collection of a judgment (unjust and inequitable though it might be), where the party had an adequate and available remedy at law by a cross-action, as for breach of warranty of the property for the

⁶⁰ Williamson v. Appleberry, 1 Hen. & M. 206.

⁶¹ Muse v. Wafer, 29 Kans. 279.

⁶² Kohn v. Lovett, 48 Ga. 179.

⁶³ Picket v. Morris, 2 Wash. (Va.) 255.

⁶⁴ Nelson v. Rockwell, 14 Ill. 375.

price of which the suit was brought.⁶³ So where the defendant was prevented by unavoidable accident from setting up offsets to the plaintiff's demand, which were not connected with the claim sued on and may be enforced at law, he is not entitled to enjoin the judgment and interpose his counterclaims against it, but must pursue his remedy at law.⁶⁴ The availability of the legal remedy being the test, it would seem that the existence of a counterclaim, capable of being used as an independent cause of action, should be no bar to equitable relief, if it could not be enforced against the plaintiff in consequence of his being a non-resident and keeping beyond the jurisdiction. But the courts hold otherwise. On this state of facts an injunction has been refused.⁶⁵ On the same principle, equity will not interfere to give relief where the judgment debtor is in such a position that he may make himself whole, immediately upon paying the judgment, by a suit at law against a person who is responsible over to him for the loss or damage he may suffer.⁶⁶

PART II. GROUNDS FOR ENJOINING JUDGMENTS.

§ 365. General Grounds for Equitable Relief.

There are two reasons why equity is slow to interfere with the operation of judgments recovered in a court of law. In the first place, it is sensitive to the imputation of seeking to usurp a species of appellate jurisdiction and so to extend its power over all other courts. And secondly, a judgment on the merits ought to be forever conclusive between the parties, no re-examination should be allowed, and it is neither the function nor the ambition of equity to overhaul judgments at law. Hence, in applying to equity for relief, it is necessary that something more than a merely erroneous or irregular judgment should be shown. Some of the elements which universally afford an attaching-point for the equitable jurisdiction must be present, making it unconscientious for the successful party

⁶³ *Ponder v. Cox*, 26 Ga. 485; *Henry v. Elliott*, 6 Jones Eq. 175.

⁶⁴ *Hudson v. Kline*, 9 Gratt. 379.

⁶⁵ *Beall v. Brown*, 7 Md. 393.

⁶⁶ *Drake v. Lyons*, 9 Gratt. 54.

to enforce his judgment as it stands. Thus, if the defense was one which could not be interposed at law, equity will relieve, because the party has not had a fair trial. So if he was ignorant of his defense, and guilty of no laches in failing to discover it; or was prevented from setting it up by fraud or accident, or the act of his adversary, without any negligence or fault on his own part. The object of an injunction to stay proceedings at law is to prevent the party against whom it issues from availing himself of an unfair advantage, resulting from fraud, accident, mistake, or otherwise, and which would therefore be against conscience.⁶⁷ Hence equity cannot relieve against the operation of a judgment at law simply on account of its hardship.⁶⁸ It must first of all appear that it would be unjust and against conscience to enforce the judgment.⁶⁹ Then it must be shown that if a new and fair examination of the merits be had, the result will be other than that already reached.⁷⁰ There must be a meritorious defense. No matter what circumstances of fraud or irregularity may have attended the entry of the judgment, if it appears that no defense was made because no valid defense existed, and that the instrument in suit was given for a valid and valuable consideration, an injunction will be refused.⁷¹ Nor will equity interfere unless it shall also be shown that the party has used due diligence and exhausted every means of defending the case or obtaining redress at law.⁷² But on the other hand, where a proper case for relief by injunction is made out, the fact that the judgment-creditor is of undoubted solvency and able to refund the money which may be collected on the execution, will not prevent such equitable intervention.⁷³

⁶⁷ Little v. Price, 1 Md. Ch. Dec. 183; Bachelder v. Bean, 76 Me. 370.

⁶⁸ Hill v. Rogers, Rice Ch. 7; Hamilton v. Adams, 15 Ala. 596, 50 Am. Dec. 150.

⁶⁹ Fowler v. Lee, 10 Gill & J. 358, 33 Am. Dec. 172.

⁷⁰ Taggart v. Wood, 20 Iowa, 286; Sauer v. Kansas, 69 Mo. 46.

⁷¹ Sohler v. Merrill, 8 Wood. & M. 179.

⁷² Wells v. Wall, 1 Oreg. 295; Nevins v. McKee, 61 Tex. 412.

⁷³ Carrington v. Holabird, 19 Conn. 84.

§ 366. General Rule stated.

The leading case in America upon the subject of equitable relief against judgments at law, is that of *Marine Insurance Co. v. Hodgson*.⁷⁴ In that case Chief Justice Marshall specified the grounds for the interference of equity in the following terms: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." And the principles here set forth, though perhaps somewhat extended by more recent decisions, have been adopted without question, as a general statement of the rule, in all our courts.⁷⁵ "When a party goes into chancery after a trial at law," says a learned judge in New York, "he must be able to impeach the justice and equity of the verdict, and it must be upon grounds which either could not be made available to him at law, or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party, without any negligence or other fault on his part."⁷⁶ "A court of equity does not interfere with judgments at law unless the complainant has an equitable defense, of which he could not avail himself at law because it did not amount to a legal defense, or had a good

⁷⁴ 7 Cranch, 382.

⁷⁵ *Railroad Co. v. Neal*, 1 Woods, 353; *Emerson v. Udall*, 13 Vt. 477; *Pettes v. Whitehall Bank*, 17 Vt. 435; *Wingate v. Haywood*, 40 N. H. 437; *Hibbard v. Eastman*, 47 N. H. 507; *Vilas v. Jones*, 1 N. Y. 274; *Briesch v. McCauley*, 7 Gill, 189; *Little v. Price*, 1 Md. Ch. 182; *Kent v. Richards*, 8 Md. Ch. 392; *Windward v. Allen*, 18 Md. 196; *Alford v. Moore*, 15 W. Va. 597; *Braden v. Reitzenberger*, 18 W. Va. 286; *Ponder v. Cox*,

26 Ga. 485; *Watts v. Gayle*, 20 Ala. 817; *Lafon v. Desessart*, 1 Mart. N. S. 71; *Nevins v. McKee*, 61 Tex. 412; *Lester v. Hoskins*, 26 Ark. 68; *Miller v. Morse*, 23 Mich. 365; *Kelleher v. Boden*, 55 Mich. 295, 21 N. W. Rep. 846; *Proctor v. Pettit* (Nebr.), 41 N. W. Rep. 181; *Wells v. Wall*, 1 Oreg. 295; *Mastick v. Thorp*, 29 Cal. 444; *Boston v. Haynes*, 33 Cal. 31; *Taggart v. Wood*, 20 Iowa, 236.

⁷⁶ *Vilas v. Jones*, 1 N. Y. 274.

defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."⁷⁷ So speak all the authorities.

§ 367. Errors and Irregularities.

The doctrine is fully established that a court of equity will not, on the application of the defendant in a judgment at law, who has had a fair opportunity to be heard upon a defense over which the court pronouncing the judgment had full jurisdiction, set aside the judgment or enjoin its enforcement simply on the ground that it was *unjust, irregular, or erroneous*, or because the equity court would, in deciding the same case, have come to a different conclusion.⁷⁸ A good illustration of this rule is furnished by the decision in a case where the defendant at law, after losing his case by reason of a suggestion of the court that his remedy was in chancery and not at law, applied for relief in equity. It was said: "If the party chose to believe in the opinion of the court, it must be at his own hazard, and

⁷⁷ *Hendrickson v. Hinckley*, 17 How. 443.

⁷⁸ 2 Story's Eq. Jur. § 1572; *Baker v. Morgan*, 2 Dow, 526; *Tarver v. Tarver*, 9 Pet. 174; *Ludlow v. Ramsey*, 11 Wall. 581; *Pettes v. Whitehall Bank*, 17 Vt. 485; *Fletcher v. Warren*, 18 Vt. 45; *Paddock v. Palmer*, 19 Vt. 581; *Stillwell v. Carpenter*, 59 N. Y. 414; *Shottenkirk v. Wheeler*, 3 Johns. Ch. 279; *De Reimer v. Cantillon*, 4 Johns. Ch. 85; *Holmes v. Remsen*, 7 Johns. Ch. 286; *Donovan v. Finn*, 1 Hopk. Ch. 59, 14 Am. Dec. 531; *Vanarsdelon v. Whitaker*, 10 Phila. 153; *Holmes v. Steele*, 28 N. J. Eq. 173; *Phillips v. Pullen*, (N. J. Eq.), 16 Atl. Rep. 9; *Methodist Church v. Mayor of Baltimore*, 6 Gill, 391, 48 Am. Dec. 540; *Boyd v. Chesapeake Co.*, 17 Md. 195, 79 Am. Dec. 646; *Slack v. Wood*, 9 Gratt. 40; *McDowall v. McDowall*, 1 Bail. Eq. 324; *Stockton v. Briggs*, 5 Jones Eq. 309; *Grantham v. Kennedy*, 91 N. Car. 148; *Cohen v. Dubose*, 1 Harp. Ch. 102,

14 Am. Dec. 709; *Hunt v. Coachman*, 6 Rich. Eq. 286; *Turpin v. Thomas*, 2 Hen. & M. 189, 3 Am. Dec. 615; *Robuck v. Harkins*, 38 Ga. 174; *Jones v. Watkins*, 1 Stew. (Ala.) 81; *Coffin v. McCullough*, 30 Ala. 107; *Saunders v. Albritton*, 37 Ala. 716; *Ammons v. Whitehead*, 31 Miss. 99; *Walker v. Villavaso*, 26 La. Ann. 42; *Fitzhugh v. Orton*, 12 Tex. 4; *Pryor v. Emerson*, 22 Tex. 162; *Roller v. Wooldridge*, 46 Tex. 485; *Reynolds v. Horine*, 13 B. Mon. 284; *Burke v. Wheat*, 22 Kans. 722; *Missouri Pac. R. Co. v. Reid*, 34 Kans. 410, 8 Pac. Rep. 846; *Ex parte Christian*, 23 Ark. 641; *Clopton v. Carloss*, 42 Ark. 560; *Dunn v. Fish*, 8 Blackf. 407; *Macy v. Lloyd*, 23 Ind. 60; *De Haven v. Covalt*, 83 Ind. 344; *Drake v. Hanshaw*, 47 Iowa, 291; *Hazeltine v. Reusch*, 51 Mo. 50; *Merritt v. Baldwin*, 6 Wis. 439; *Jilson v. Stebbins*, 41 Wis. 235; *Ableman v. Roth*, 12 Wis. 81; *Pico v. Sunol*, 6 Cal. 294; *Logan v. Hillegass*, 16 Cal. 200.

it now seems to me to be no good ground for relief in equity that the court or his counsel gave him bad advice; he should have excepted to the opinion of the court in refusing to continue, and if on examination this should be found to be error, then he would have had relief; but having failed to do so furnishes no more ground for relief than he would have been entitled to if the court had committed any other error, and he had submitted to it till it was too late to redress it."⁷⁹ To take another illustration,—where a judgment was rendered according to a particular construction of a statute, and, after a writ of error thereon was barred by the statute of limitations, the supreme court gave a different construction to the statute in another case, it was held that equity would not interfere to open the judgment.⁸⁰ Again, that a debt was divided and suits brought on each portion in a justice's court which would have no jurisdiction over one suit for the whole amount, is no reason for enjoining the judgment in one suit, unless it also appears that by means of the division the defendant was deprived of some right or remedy, and that he had not consented to the division.⁸¹ It is well settled that no injunction can be had against a judgment merely on account of a defect or insufficiency of the evidence, or because the rules of evidence were violated on the trial.⁸² So an error in the calculation of interest on a judgment rendered and sought to be executed is no ground for an injunction.⁸³ But where, through fraud, accident, or mistake, a judgment has been entered for an amount, or in terms, not as intended, equity will give relief, on clear and satisfying proof.⁸⁴ Or, as differently stated, equity will relieve in cases of mistakes in judgments, decrees, or other matters of record, when the mistake is not judicial and there are no other means of obtaining redress.⁸⁵ Thus, where the defendant agreed that

⁷⁹ *Risher v. Roush*, 2 Mo. 95, 22 Am. Dec. 442.

⁸⁰ *Jones v. Watkins*, 1 Stew. (Ala.) 81. And see *Cassel v. Scott*, 17 Ind. 514.

⁸¹ *Pryor v. Emerson*, 22 Tex. 162.

⁸² *Pico v. Sunol*, 6 Cal. 294; *Hunt v. Coachman*, 6 Rich. Eq. 286; *Merritt v. Baldwin*, 6 Wis. 489; *Vaughn v. Johnson*, 9 N. J. Eq. 173.

⁸³ *Walker v. Villavaso*, 26 La. Ann. 42.

But where a jury by mistake omitted to include interest in their verdict, and the mistake was not discovered in time to apply to the law court for relief, it was held that equity might relieve against the mistake. *Cohen v. Dubose*, 1 Harp. Ch. 102, 14 Am. Dec. 709.

⁸⁴ *Katz v. Moore*, 18 Md. 566.

⁸⁵ *Smith v. Butler*, 11 Oreg. 46, 4 Pac. Rep. 517.

the justice before whom the case was pending should enter a conditional judgment against him, and the justice entered an absolute judgment by confession, it was considered that equity might relieve.⁸⁸ So where a judgment was entered against a sheriff, under a mistake of the clerk in supposing a bail-piece to be insufficient, when the counsel had agreed that it might be filed, relief was granted against the judgment.⁸⁹

§ 368. Fraud.

Fraud has always been reckoned among the special abhorrences of equity, and fraud is one of the grounds upon which application is most frequently made to equity for relief or redress. It is well settled that equity will enjoin a party from enforcing a judgment which he has obtained by means of fraud.⁹⁰ "Fraud will vitiate a judgment, and a court of equity may declare it a nullity. Equity has so great an abhorrence of fraud that it will set aside its own decrees if founded thereupon."⁹¹ The rule is concisely stated by the chancery court in New Jersey in the following language: "The court will grant relief against a judgment which is against conscience, which was obtained by fraud or in any other way by which injustice has been done, and where the injured party has had no opportunity for defense, or could not make it through any defect of the law, and where adequate relief cannot be afforded by the court where such judgment is obtained, and timely application for relief is made to this court."⁹² A bill will lie to vacate a judgment for fraud, even although it has already been made the foundation in another state of a suit in which

⁸⁸ *Gwinn v. Newton*, 8 Humph. 710.

⁸⁹ *Smith v. Wallace*, 1 Wash. (Va.) 254.

⁹⁰ *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. Rep. 71; *Wingate v. Haywood*, 40 N. H. 437; *Pearce v. Olney*, 20 Conn. 544; *Carrington v. Holabird*, 17 Conn. 580; *Greene v. Haskell*, 5 R. I. 447; *Munn v. Worrall*, 16 Barb. 221; *Corwith v. Griffin*, 21 Barb. 9; *Whittlesey v. Delaney*, 73 N. Y. 571; *Binsse v. Barker*, 18 N. J. Law, 263, 23 Am. Dec. 720; *Burch v. Scott*, 1 Bland, 112; *Kent v. Richards*, 8 Md. Ch. 392; *Poindexter v.*

Waddy, 6 Munf. 418, 8 Am. Dec. 749; *Smith v. Hays*, 1 Jones Eq. 321; *Brown v. Thornton*, 47 Ga. 474; *Dugan v. McGann*, 60 Ga. 353; *Hair v. Lowe*, 19 Ala. 224; *Hahn v. Hart*, 12 B. Mon. 426; *Crank v. Flowers*, 4 Heisk. 629; *Ogden v. Larrabee*, 57 Ill. 889; *Cowin v. Toole*, 31 Iowa, 518; *Bresnahan v. Price*, 57 Mo. 422; *Payne v. O'Shea*, 84 Mo. 129; *Burkee v. Smith*, (Walk.) Mich. 327; *Hayden v. Hayden*, 46 Cal. 832.

⁹¹ *Wingate v. Haywood*, 40 N. H. 437.

⁹² *Moore v. Gamble*, 9 N. J. Eq. 246.

the defendant's property in that state has been attached.⁸¹ But equity will not interfere on the ground of fraud unless the fraud is clearly stated and proved.⁸² And allegations that the judgment was obtained "through fraud and other ill practices" are too vague and general.⁸³ And further, in order to obtain equitable relief against a judgment on the ground of fraud, it is necessary to be alleged and shown that there is a good defense on the merits.⁸⁴ Or, as otherwise stated, it must be made clearly to appear that the judgment has no other foundation than the fraud charged, and that if there had been no fraud there would have been no judgment.⁸⁵ Thus equity will not relieve against a judgment alleged to have been obtained by fraud, where the relief asked for is merely a reduction of the damages.⁸⁶ It has been adjudged a good ground for the intervention of equity that the judgment, fairly and regularly rendered, has afterwards been fraudulently altered so as to increase the amount for which it stands,⁸⁷ or so as to include a person not originally named in it nor made a party to the action.⁸⁸ Aside from the cases just instanced, it is evident that the fraud on which the application to equity is based may be of three different characters, or arise in three several ways. First, there may have been fraud in the instrument or transaction on which the judgment at law is founded. This, since it constitutes a good defense to the suit at law, must be set up then and there. If the defendant was ignorant of it, or had no opportunity to plead it, or was prevented from setting it up by the artifice or fraud of his adversary, it may be available on a subsequent application to chancery. But otherwise it furnishes no ground for equitable interference.⁸⁹ Secondly, whatever was the character of the defense, supposing it to be good and meritorious, the successful party may have practised fraud or trickery in such wise as to prevent the other from

⁸¹ *Edson v. Cumings*, 52 Mich. 52, 17 N. W. Rep. 693.

⁸² *Jones v. South*, 8 A. K. Mar. 353.

⁸³ *Rooks v. Williams*, 13 La. Ann. 374.

⁸⁴ *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. Rep. 71; *Hair v. Lowe*, 19 Ala. 224; *Pearce v. Olney*, 20 Conn. 544; *Ableman v. Roth*, 12 Wis. 81; *Way v. Lamb*, 15 Iowa, 79.

⁸⁵ *Dringer v. Receiver of Erie Ry. Co.*, 43 N. J. Eq. 573, 8 Atl. Rep. 811.

⁸⁶ *Essex v. Berry*, 2 Vt. 161; *Murdock v. De Vries*, 37 Cal. 527.

⁸⁷ *Babcock v. McCamant*, 53 Ill. 214.

⁸⁸ *Chester v. Miller*, 13 Cal. 558.

⁸⁹ *Muscatine v. Miss. & Mo. R. Co.*, 1 Dill. 536. And see *infra*, § 373.

bringing it before the court. Here equity will relieve, if the applicant himself was guilty of no negligence or fault. And thirdly, the fraud charged may have been practised in the act of procuring the judgment to be entered, or in taking judgment in violation of an agreement to the contrary. This also is sufficient ground for the interference of equity. These propositions will be elaborated in the next succeeding sections.

§ 369. Fraud in Preventing Defense.

Where a party, having a good defense to an action commenced against him at law, is prevented, by the fraud or fraudulent representations of the plaintiff or his attorney, from setting up that defense, and a judgment is obtained against him, without any negligence or fault on his part, it is a proper case in equity for relief against the judgment.¹⁰⁰ As remarked by a learned judge, "a decree or judgment receives its force from the fact that it is the decision of a competent tribunal, before which both the parties have had an opportunity of appearing and prosecuting their claims and having them fairly adjudicated. When this is prevented by the fraud or circumvention of one of the parties, without the fault or negligence of the other, the decree or judgment of the court ceases to have its binding effect, and it is competent for the party injured to resort to a court of chancery to obtain relief."¹⁰¹ Thus, in one case, a perpetual

¹⁰⁰ *Huggins v. King*, 8 Barb. 616; *Spencer v. Vigneaux*, 20 Cal. 442; *Cummins v. White*, 4 Blackf. 356; *Mack v. Doty*, Harr. Ch. (Mich.) 366; *Poindexter v. Waddy*, 6 Munf. 418, 8 Am. Dec. 749; *De Louis v. Meek*, 2 Greene (Iowa), 55, 50 Am. Dec. 491.

¹⁰¹ *Lockwood v. Mitchell*, 19 Ohio, 448, 53 Am. Dec. 438. This was also the ground of the decision in the remarkable litigation reported as "The Wagner Cases," 59 Md. 318, a. c. 16 Reporter, 594. The circumstances of this case disclose such a singular and unprecedented state of facts that they deserve somewhat extended mention, both as

a matter of legal curiosity and as an illustration of the rule stated in the text. We quote as follows from the opinion of Judge Miller: "In these seventeen cases appeals have been taken by Harrison Wagner from the same number of decrees of the circuit court for Frederick county, sitting in equity, perpetually enjoining the execution of a large number of magistrates' judgments rendered in his favor against the several appellees. They present, as a whole, a case without precedent in judicial annals. They show the rendition of 1296 magistrates' judgments, amounting in the aggregate to

injunction was granted, in order to stay proceedings on a judgment at law obtained in a suit instituted in the name of a person not interested, whose name was used only for the purpose of preventing a

\$127,886 debt, and \$2848.10 costs, in favor of the appellant. They were all rendered by John A. Wilson and John H. Locke, two justices of the peace in Frederick county, 791 of them by the former, and 505 by the latter. Eight hundred and sixty-two are for the exact sum of \$98 each, 432 for \$100 each, and two for \$80 each. The bills in these cases were filed by the twenty-seven defendants in these judgments, praying for injunctions to restrain the enforcement of them, and that the same be cancelled or otherwise dealt with as right and justice may require. With respect to the judgments rendered by Wilson, the bills charge in substance that Wagner, maliciously and wickedly designing and intending to cheat, defraud, and swindle the complainants out of large amounts of money, procured these judgments to be entered up by Wilson, who was falsely and unlawfully pretending to be a justice of the peace, but who, in fact, had no authority at the time to act as such; that neither at the time of the institution of the pretended suits nor at the time when the pretended judgments were rendered were the complainants indebted to Wagner in any sum of money whatever, and that the same, as well as any pretended claims upon which they may be founded, are wholly false, vexatious, and oppressive, and without any pretence or color of right or justice, and that the complainants had no knowledge of their existence until nearly a year after they were rendered. Interlocutory decrees, for want of answers, were entered in all the cases except one, and testimony under *ex parte* commissioners was taken by the complainants. Wagner, however, subsequently filed his answers, in which he denies all the allegations of fraud con-

tained in the bills, avers that the several complainants were duly summoned in the several cases before the magistrate, who, he insists, was duly authorized to act as such at the time, declares that the judgments are genuine, valid, and effective, and admits that at the time of the filing of the bills it was his purpose and intention to enforce them. The gross iniquity of this whole transaction, manifest enough upon its face, is abundantly established by the proof. Wilson lived in a district of the county and at a place remote from that in which the parties sued resided, and these 791 judgments were rendered by him on fourteen different days, from the 30th of September to the 26th of December, 1878, all of them, save sixty, in the month of October, and as many as 242 on one day in that month. The inference is irresistible that he merely wrote them out on his docket without examining witnesses, and without the semblance even of an *ex parte* trial. The claims on which they are founded do not appear in the records, but it is impossible to conceive that Wagner could have had this number of separate *bona fide* claims against these parties, each for the exact sum either of \$100 or of \$98. It would be taxing credulity beyond all reasonable limits to ask any one to believe that such a set of claims ever grew out of honest dealings. But the complainants all testify that they never owed the man a cent; that they never had any business with him, and some of them swear that they never knew that such a person existed. . . . But the appellant, by his counsel, insists that all this proof is immaterial; that the complainants were duly summoned, and should have defended the suits before the magistrate; that not having done so, and not having ap-

defense which the defendant had against the real plaintiff in interest.¹⁰² Fraud of this character—used as a means of preventing a defense—assumes many various shapes. One of its most frequent appearances consists in the violation of an agreement to dismiss the suit or not to press it. But this topic will be separately discussed in another section.

§ 370. Fraud in Procuring the Judgment.

While it is true that equity will not generally listen to an impeachment of a judgment on the ground of fraud, when the fraud alleged was antecedent to the judgment and was or might have been litigated in the action at law, yet fraud practised in the very matter of obtaining the judgment is regarded as perpetrated upon the court as well as upon the injured party, and a judgment so procured may be enjoined.¹⁰³ The rule has been thus stated: "The question of fraud

pealed therefrom, the judgments are now conclusive, and the rule is inflexible that in such a case a court of equity has no power to interfere. [This was of course the point upon which Wagner intended, from the very first, to rely.] But assuming that these cases, extraordinary and unprecedented as they are, cannot be treated as constituting an exception to the general rule, there is, fortunately for the ends of justice, proof enough in the records to exempt them from its operation. The rule is that where a party fails to avail himself of his proper defense at law, and is not prevented from so doing by fraud or accident, or the acts of the opposite party, unmixed with any negligence or fault on his part, equity will not interfere. *Gott v. Carr*, 6 G. & J. 812; *Kirby v. Pascault*, 53 Md. 586. But this rule, in terms, recognizes the doctrine, which is equally well settled, that where a party is not in fault by failing to use reasonable diligence, and is prevented from defending the action at law by fraud or accident, or the acts of

the opposite party, equity will lend its aid and give relief; and the proof shows that the complainants in all the cases involving these Wilson judgments, except two, are entitled to relief upon this ground alone." The court then proceeded to consider the evidence contained in the record as to the various cases, and continued: "This disposes of the judgments rendered by Locke, and we leave them with the remark that here, as in the case of those rendered by Wilson, the parties affected had no knowledge of their existence, and no attempt was made to execute them, until long after the time for appeal had passed. On this point the testimony in all the cases is the same, and is conclusive. As to the jurisdiction of a court of equity to pass the decrees appealed from we entertain no doubt." The court also held that equity could *cancel* the judgments.

¹⁰² *Greenleaf v. Maher*, 2 Wash. C. C. 393.

¹⁰³ *Muscatine v. Miss. & Mo. R. Co.*, 1 Dill. 586; *California Beet Sugar Co. v.*

which is open to examination in such case is as to something which intervened in the proceedings by which the judgment was obtained, and it must have occurred in the very concoction or procuring of the judgment, and not have been known to the opposite party at the time, and for not knowing which he is not chargeable with neglect or inattention. The fraud must consist in something of which the complaining party could not have availed himself in the court giving the judgment, or of which he was prevented from availing himself there by fraud."¹⁰⁴ Where a claim on which an action had been brought was settled before the term of the court began, and the plaintiff wrongfully entered the action and took judgment, the court in equity granted an injunction against the execution.¹⁰⁵ So where a written agreement was made, on the understanding that payment might be made in money, or in property at a valuation by two honest men, and that this understanding should be indorsed upon the agreement, which the party afterwards refused to do, but took judgment on the contract, it was held that chancery would consider the indorsement as made and would enjoin the judgment.¹⁰⁶ But in order to obtain this relief it is essential that the complainant himself should be entirely free from any fraud or improper conduct. Thus a party against whom a judgment has been entered on a bond cannot obtain relief in equity, against such judgment, on the ground that he was acting as the agent of the judgment plaintiff in the sale of territory in which to sell a patented article, and that such bond was only a sham, by which to induce others to purchase patent rights, and was never to be enforced against him.¹⁰⁷

§ 371. Deceit and Concealment.

Where a judgment at law has been procured by artifice or concealment on the part of the plaintiff, and the court where the fraud has

Porter, 68 Cal. 369, 9 Pac. Rep. 313; Watts v. Frazer, 80 Ala. 186; Hogg v. Link, 90 Ind. 846; Pearce v. Olney, 20 Conn. 544; 2 Pomeroy, Eq. Jur. § 919.

¹⁰⁴ Stilwell v. Carpenter, 2 Abb. New Cas. 238, 263.

¹⁰⁵ Devoll v. Scales, 49 Me. 320.

¹⁰⁶ Dandridge v. Harris, 1 Wash. (Va.) 326, 1 Am. Dec. 465.

¹⁰⁷ Barnett v. Barnett, 83 Va. 504, 2 S. E. Rep. 733.

been perpetrated is not able to afford adequate relief, a court of equity will take hold of the party who has committed the fraud and will prevent his using the judgment to the injury of his adversary.¹⁰⁸ Thus a vendee of land may come into equity to enjoin a judgment at law on the notes given for purchase-money, upon alleging the vendor's fraudulent representations of title in himself, a breach of his warranty of title, and the insolvency of his estate.¹⁰⁹ So on account of a deficiency in the quantity of the land sold, which would entitle the vendee to a diminution of the price.¹¹⁰ So on account of a representation that the property was free from charges, when in fact it was incumbered by liens for more than its value.¹¹¹ In a case where the sureties on a replevin-bond alleged that they had been induced, while in a state of intoxication, to sign a blank paper, upon which the bond was afterwards written in, it was held that equity would not relieve them unless it were shown that an unfair advantage had been taken of their condition to their detriment.¹¹²

¹⁰⁸ *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Griffith v. Reynolds*, 4 Gratt. 46; *Pratt v. Northam*, 5 Mason, 95; *Fish v. Lane*, 2 Hayw. 522. In the case of *Spencer v. Vigneaux*, 20 Cal. 442, it appeared that S. sued V., G., and D., as partners, on a claim for \$22,000; by the instrumentality of V., \$10,000 had been paid on account of this claim, and should have been credited; but by collusion between S. and V. this fact was kept a secret from G. and D., and they were induced to let judgment be taken against them for the whole amount. Afterwards, having paid on the judgment more than the amount which would have been due after the proper credit of \$10,000, they discovered the true state of the case and refused to pay the remainder, whereupon S. sued them for it upon the judgment. At this trial they offered to show the foregoing facts in defense, and D. further stated in his answer that, having been informed before the first trial that such a payment of \$10,000 had been made, he had inquired of V., who denied it; that all the

books of the partnership were in V.'s possession, and he was unable to get any further personal knowledge about the matter. Held, that this defense might be made, that D.'s statement exculpated him from laches, and that G. and D. were entitled to an injunction against S. to prevent the enforcement of the original judgment.

¹⁰⁹ *Walton v. Bonham*, 24 Ala. 518; *Wray v. Furniss*, 27 Ala. 471; *Cox v. Jerman*, 6 Ired. Eq. 526; *Graham v. Tankersley*, 15 Ala. 684; *Jaynes v. Brock*, 10 Gratt. 211.

¹¹⁰ *Davis v. Millandon*, 14 La. Ann. 868.

¹¹¹ *Poe v. Decker*, 5 Ind. 150. But a vendee who enters under a title-bond and holds the land under that title till the statute of limitations bars a recovery against him by an adverse title, cannot set up defect of title in his vendor, existing at the date of the sale to him, as ground for an injunction against a judgment for the purchase money. *Amick v. Bowyer*, 8 W. Va. 7.

¹¹² *Campbell v. Ketcham*, 1 Bibb, 406.

§ 372. Perjury.

Whether relief will be granted in equity on the ground that the judgment was procured by the perjury of the plaintiff or a witness, is disputed. There are some English and American cases holding that such action is proper, where adequate redress cannot be had at law, and where the proof to convict the perjured witness could not be obtained in time to be used on the trial.¹¹³ But other decisions refuse to recognize this as a sufficient ground for equitable interference.¹¹⁴ A recent New York case holds that an equitable action cannot be maintained to annul a judgment rendered upon conflicting evidence, on the ground that the opposite party and his witnesses conspired together to obtain a judgment by perjury and fraud and that the judgment was obtained by false evidence.¹¹⁵ The same position is also taken in a late decision by one of the federal courts, where the learned judge declared that "it is not sufficient ground for relief in equity against a judgment at law that one of the parties, or that some witness, or many witnesses, testified falsely upon a material question of fact in issue. If, upon such grounds, a court of chancery were to reopen issues settled by verdict of a jury, and thus relieve suitors from judgments recovered at law, it is difficult to see where litigation would stop, and what stability there would be in the adjudications of courts of law."¹¹⁶

§ 373. Taking Judgment contrary to Agreement.

If the plaintiff or his attorney makes promises or representations to the defendant, to the effect that the suit will not be pressed, or brought to trial, or will be dismissed, or that credits will be allowed, or that no recovery will be sought against him, or any other similar

¹¹³ Coddington v. Webb, 2 Vern. 240; Tovey v. Young, Prec. in Chanc. 193; Peagram v. King, 2 Hawks, 605, 11 Am. Dec. 793; Burgess v. Lovengood, 2 Jones Eq. 457. As to perjury as a ground for opening and vacating judgments, see, *supra*, § 323.

¹¹⁴ Demeritt v. Lyford, 27 N. H. 541; Gott v. Carr, 6 Gill & J. 309; Smith v. Lowry, 1 Johns. Ch. 820.

¹¹⁵ Ross v. Wood, 70 N. Y. 8.

¹¹⁶ Cotzhausen v. Kerting, 29 Fed. Rep. 831.

matter, to induce him to refrain from defending the case, and if the latter, honestly relying upon the understanding thus established, omits to present his defense, notwithstanding which the plaintiff fraudulently and in violation of the agreement proceeds to take a judgment, equity will grant relief by injunction.¹¹⁷ So where a judgment is fraudulently taken by default in violation of an agreement for a compromise, the interposition of a defense being thus prevented, its enforcement will be restrained, and titles acquired under it (with notice) will be voidable in equity.¹¹⁸ So equity will relieve against a judgment obtained by inducing the defendant to withdraw an equitable plea filed in the case, by a promise of the plaintiff that if such plea were withdrawn he would do the equity set up in the plea, which he failed to do.¹¹⁹ In another case, where the maker of a promissory note held a receipt, acknowledging payment thereof, from the indorsee, who sued upon the note, representing to the maker that he did not intend to enforce its collection against him, but against the payee, and judgment was accordingly rendered by default, it was held that an injunction should be granted perpetually restraining the collection of the judgment from the maker.¹²⁰ Where a defendant suffers judgment to be taken against him in consideration of an agreement on the plaintiff's part that no money need be paid on it except upon the happening of a certain event, the plain-

¹¹⁷ *Pearce v. Olney*, 20 Conn. 544; *Chambers v. Robbins*, 28 Conn. 552; *Hinckley v. Miles*, 15 Hun. 170; *Dobson v. Pearce*, 12 N. Y. 156; *Moore v. Gamble*, 9 N. J. Eq. 246; *Miller v. Harrison*, 82 N. J. Eq. 76; *Chase v. Manhardt*, 1 Bland, 338; *Kent v. Ricards*, 8 Md. Ch. 392; *Holland v. Trotter*, 22 Gratt. 136; *Jarman v. Saunders*, 64 N. Car. 367; *Markham v. Angier*, 57 Ga. 48; *Purvi-ance v. Edwards*, 17 Fla. 140; *Brooks v. Whitson*, 7 Sm. & Mar. 513; *Newman v. Meek*, 1 Sm. & Mar. Ch. 381; *Bumley v. Rice*, 21 Tex. 171; *Williams v. Fowler*, 2 J. J. Mar. 405; *Broadus v. Broadus*, 3 Dana, 536; *Edmonson v. Mosely*, 4 J. J. Mar. 497; *Newman v. Thomas*, 5 Heyw. 78; *Brandon v. Green*, 7 Humph. 190; *Stone v. Lewman*, 28 Ind.

97; *Johnson v. Unversaw*, 30 Ind. 435; *Wierich v. De Zoya*, 2 Gilm. 385; *Beams v. Denham*, 2 Scam. 58; *How v. Mortell*, 28 Ill. 479; *Rogers v. Gwinn*, 21 Iowa, 58; *De Louis v. Meek*, 2 Greene (Iowa), 55, 50 Am. Dec. 491; *Baker v. Redd*, 44 Iowa, 179; *Perry v. Siter*, 37 Mo. 273; *Roberts v. Miles*, 12 Mich. 297; *Scriven v. Hursh*, 39 Mich. 98; *Keelan v. Elston*, 22 Nebr. 810, 34 N. W. Rep. 391; *Leran v. McNamara*, 55 Cal. 508.

¹¹⁸ *Murphy v. Smith*, 86 Mo. 333; *Neal's Adm'r v. Dicks*, 72 Ind. 374; *Bridgport Sav. Bank v. Eldredge*, 28 Conn. 556; *Rogers v. Gwinn*, 21 Iowa, 58; *Hibbard v. Eastman*, 47 N. H. 507; *Kent v. Ricards*, 8 Md. Ch. 392.

¹¹⁹ *Markham v. Angier*, 57 Ga. 48.

¹²⁰ *Baker v. Redd*, 44 Iowa, 179.

tiff will not be permitted to exact payment in violation of the agreement.¹²¹ So where the liability of the principal had been fixed and discharged, and the surety had been lulled into security by the delusive promises of his creditor and had been the victim of artifice and circumvention, and the judgment against him was obtained in contempt of an injunction, and the assertion of any right under it would be fraudulent, it was considered a proper case for the intervention of equity.¹²² In order to induce a court of equity to declare a judgment confessed for a certain amount to be merely collateral security for whatever sum might be found due from defendant to plaintiff, the court must be satisfied beyond a reasonable doubt that such was the agreement of the parties, but upon being so satisfied it will enjoin the enforcement of the judgment, on the ground that to enforce it would be a fraud on the defendant.¹²³ A judgment recovered before a justice for an unjust amount, after an executed agreement of settlement, relied on by the defendant, but invalid because made on Sunday, will be enjoined in equity.¹²⁴

§ 374. Unauthorized Appearance of Attorney.

It was the rule of the early English law that where a regular attorney of the court appeared and answered for the defendant in a suit at law, a judgment recovered by the plaintiff would not be vacated, nor execution enjoined by a court of equity, though the attorney appeared without authority from the defendant, *unless* it were shown that the attorney was not of sufficient ability to answer for the damages caused by his unauthorized act, or there had been collusion between him and the plaintiff. And this view was at one time generally favored by the American courts, and even now it still retains its force in some few jurisdictions.¹²⁵ But in the progressive development of the law, this harsh and inequitable rule has fallen into

¹²¹ Moore v. Barclay, 16 Ala. 158.

¹²² Cage v. Cassidy, 23 How. 109.

¹²³ Keighler v. Savage Manuf. Co., 12 Md. 383, 71 Am. Dec. 600. See Cooper v. Tyler, 46 Ill. 462, 95 Am. Dec. 442.

¹²⁴ Blakesley v. Johnson, 18 Wis. 530.

¹²⁵ Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Smyth v. Balch, 40 N. H. 368; Hoffmire v. Hoffmire, 3 Edw. Ch. 174; American Ins. Co. v. Oakley, 9 Paige, 496. See 1 Salkeld, 96.

desuetude. It has been abandoned by the English courts.¹²⁶ And in this country, almost universally, it is now held that equity may enjoin the collection of a judgment, unjust in itself, which was procured upon the appearance of an attorney without authority, without any regard to the question of the latter's solvency and ability to respond in damages.¹²⁷ But the complainant must make it appear that the judgment is inequitable in itself, by reason of some fraud or trick or collusion, or that the result would or might have been different if there had been a full and fair trial upon the merits.¹²⁸ If an attorney, assuming without authority to act for a *plaintiff*, brings a suit and loses it, the defendant recovering a judgment for costs, equity will restrain the enforcement of such judgment in the same circumstances which would induce it to relieve the defendant in the converse case.¹²⁹

§ 375. Negligence or Mistake of Counsel.

It is well settled that equity will not relieve against a judgment at law on account of any ignorance, unskillfulness, or mistake of the party's attorney (unless caused by the opposite party), nor for counsel's negligence or inattention.¹³⁰ The fault is in such cases attrib-

¹²⁶ *Bayley v. Buckland*, 1 Exch. 1; *Robson v. Eaton*, 1 Term, 62; *Hubbart v. Phillips*, 18 Mees. & W. 702.

¹²⁷ *United States v. Throckmorton*, 98 U. S. 61; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *De Louis v. Meek*, 2 Greene (Iowa), 55, 50 Am. Dec. 491; *Critchfield v. Porter*, 3 Ohio, 518; *Allen v. Stone*, 10 Barb. 547; *Jones v. Williamson*, 5 Cold. 371; *Marvel v. Manouvrier*, 14 La. Ann. 8, 74 Am. Dec. 424; *Gifford v. Thorn*, 9 N. J. Eq. 702. In *United States v. Throckmorton*, *supra*, Mr. Justice Miller said: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, [or by] a false promise of a compromise; or where the defendant

never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

¹²⁸ *Budd v. Gamble*, 13 Fla. 265; *Harris v. Gwin*, 18 Miss. 563.

¹²⁹ *Smyth v. Balch*, 40 N. H. 363; *Robson v. Eaton*, 1 Term, 62.

¹³⁰ *Crim v. Handley*, 94 U. S. 652; (463)

uted to the party himself. Thus the neglect of an attorney to plead a valid and proper defense, or to attend the trial, either intentionally or through forgetfulness, and his failure for like reasons to notify his client of the time of trial, whereby a judgment is wrongfully obtained against the client, furnishes no ground for relief against the judgment.¹²¹ So a party cannot obtain a new trial in equity, on the ground that his counsel mistook the facts of his defense, if he was present at the trial.¹²² Nor is it an adequate ground for relief that the counsel neglected to assign errors on an appeal in the case.¹²³ In a case in California it appeared that the defendant's attorney on the trial objected to the introduction of certain testimony, and the court erroneously overruled the objection. An exception was taken to the ruling, and by reason of such erroneous ruling the plaintiff recovered judgment. The testimony was taken down by the official reporter, who failed to note the objection and exception. The defendant moved for a new trial, and adopted as his statement the report of the official reporter, without observing the error in the report, and for that reason failed to obtain a new trial. It was held that the mistake had been accompanied by such negligence on the part of the attorney that a court of equity would not relieve against the judgment.¹²⁴ A few exceptions to this rule are to be discovered in the books. Thus, in an early case in Tennessee, where a defendant at law had instructed his counsel in his defense, but the plea was so framed that the evidence did not support it and the defense therefore failed, it was considered that equity would be justified in giving

Winn v. Wilson, 1 Hemp. 698; Rogers v. Parker, 1 Hughes, 148; Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178; Burton v. Wiley, 26 Vt. 480; McBroom v. Sommerville, 2 Stew. (Ala.) 515; Watts v. Gayle, 20 Ala. 817; Broda v. Greenwald, 66 Ala. 538; Dibble v. Truluck, 12 Fla. 185; Barrow v. Jones, 1 J. J. Mar. 470; Morton v. Nunnally, 3 Heyw. 210; Chester v. Apperson, 4 Heisk. 639; Graham v. Roberts, 1 Head. 56; Burton v. Hynson, 14 Ark. 32; White v. Bank, 6 Ohio, 529; Winchester v. Grosvenor, 48 Ill. 517; Dinot v. Eigenmann, 96 Ill. 39; Kern v. Straus-

berger, 7 Ill. 418; Fuller v. Little, 69 Ill. 229; Shricker v. Field, 9 Iowa, 366; Jones v. Leech, 46 Iowa, 186; Miller v. Bernecker, 46 Mo. 194; Bowman v. Field, 9 Mo. App. 576; Huebschman v. Baker, 7 Wis. 542; Farmers' Loan Co. v. Bank, 23 Wis. 249; Boston v. Haynes, 83 Cal. 81; Quinn v. Wetherbee, 41 Cal. 247.

¹²¹ Sharp v. Moffitt, 94 Ind. 240.

¹²² Jamison v. May, 18 Ark. 600.

¹²³ Miller v. Bernecker, 46 Mo. 194; Dinot v. Eigenmann, 96 Ill. 39.

¹²⁴ Quinn v. Wetherbee, 41 Cal. 247.

relief.¹²⁵ In New York—where, to be sure, the practice is excessively liberal in this respect—the courts will entertain a motion for the vacation of a judgment on the ground of the neglect or mistake of counsel. With a fine spirit of humanity, but with little regard for the settled principles of law, they declare that they will not suffer a client to be ruined because he has employed an incompetent or unworthy attorney.¹²⁶

§ 376. Want of Jurisdiction.

It is generally held that where a judgment at law is void for want of jurisdiction, no summons or notice having been served on the defendant, nor opportunity given him for defense, nor any appearance entered by or for him, equity will relieve against the judgment, if it be shown that there is a meritorious defense to the action.¹²⁷ And the fact that the law-court, in rendering judgment, passed on the sufficiency of an alleged service of the notice is not a bar to a readjudication of the question in an action to restrain execution of the judgment.¹²⁸ It is also held that where a judgment passes against a party before actual notice to him, although a copy of the writ was left at his residence, he being then absent from the state, equity will relieve if there is a substantial defense.¹²⁹ But it is no ground for relief that the defendant *forgot* that the writ was served upon him, whereby he was prevented from appearing and defending,¹³⁰ or that he erroneously supposed the

¹²⁵ *Click v. Gillespie*, 4 Heyw. 4.

¹²⁶ *Sharp v. Mayor of New York*, 81 Barb. 578.

¹²⁷ *Myers v. Daniels*, 6 Jones Eq. 1; *Morgan v. Scott*, Minor, 81; *Brooks v. Harrison*, 2 Ala. 209; *Secor v. Woodward*, 8 Ala. 500; *Crafts v. Dexter*, 8 Ala. 767; *Stubbs v. Leavitt*, 30 Ala. 352; *Robinson v. Reed*, 50 Ala. 69; *Dunklin v. Wilson*, 64 Ala. 162; *Southern Ex. Co. v. Craft*, 48 Miss. 508; *McFaddin v. Spencer*, 18 Tex. 440; *Walker v. Winne*, 3 Yerg. 62; *Ingle v. McCurry*, 1 Heisk. 26; *Ridgeway v. Bank of Tenn.*, 11 Humph. 523; *Ryan v. Boyd*, 33 Ark. 778; *Montague v. Mitchell*, 28 Ill. 481;

Weaver v. Poyer, 79 Ill. 417; *Wilday v. McConnel*, 68 Ill. 278; *Coon v. Jones*, 10 Iowa, 181; *Givens v. Campbell*, 20 Iowa, 79; *Campbell v. Edwards*, 1 Mo. 324; *San Juan Co. v. Finch*, 6 Colo. 214; *Martin v. Parsons*, 49 Cal. 94; *Jeffery v. Fitch*, 46 Conn. 601. *Per contra*, *Armstrong v. Cheshire*, 2 Dev. Ch. 234, 84 Am. Dec. 273.

¹²⁸ *State Ins. Co. v. Waterhouse*, (Iowa), 43 N. W. Rep. 611.

¹²⁹ *Jones v. Bank*, 5 How. (Miss.) 48, 85 Am. Dec. 419.

¹³⁰ *Cullum v. Casey*, 1 Ala. 351; *Deweese v. Richardson*, 1 A. K. Marsh. 312.

suit was intended to be against another person.¹⁴¹ Nor will equity relieve on account of the want of notice, where it appears that the rendition of the judgment was suspended, by consent, until the opinion of the supreme court in another case between the same parties could be had, and that the judgment was not given until after such opinion had been obtained.¹⁴² Chancery has also refused to interfere in a case where the defendant, not denying that he had been duly served, alleged that he was not a citizen or resident of the state and had been fraudulently decoyed within the jurisdiction in order to procure service on him; for, said the court, the objection should have been taken by appearing in the original suit and moving to set aside the service.¹⁴³ Applications of this character are most commonly made in cases where, out of several defendants, only a part have been notified of the suit. Thus a judgment rendered against a joint maker of a note, without service upon him of any summons or process, is void, and where it appears that the right of action on the note has expired, so that there exists a good defense, a perpetual injunction will be granted, restraining the execution of such judgment.¹⁴⁴ So a judgment confessed by one partner against the firm, without the consent of the others, will be enjoined.¹⁴⁵ But on the other hand, where a judgment has been obtained against a principal and surety, it is no ground for an injunction in favor of the surety that the *principal* was not served with process and had no opportunity to defend.¹⁴⁶ Equity also has jurisdiction to vacate a judgment which has been fraudulently altered so as to include a defendant who was not served and not originally included in the judgment.¹⁴⁷ Although the general consensus of judicial opinions is as stated in the beginning of this section, the decisions in some of the states hold that equity ought not to restrain a judgment on the mere ground that it was void for want of jurisdiction, since the complainant has an adequate remedy at law, by motion, or otherwise, in the original cause.¹⁴⁸ Probably the true note of dis-

¹⁴¹ Higgins v. Bullock, 73 Ill. 205.

¹⁴² Stein v. Burden, 80 Ala. 270.

¹⁴³ Marsh's Admr. v. Bast, 41 Mo. 493.
Compare Grass v. Hess, 87 Ind. 198.

¹⁴⁴ Gerrish v. Seaton, 78 Iowa, 15, 84 N. W. Rep. 485.

¹⁴⁵ Christy v. Sherman, 10 Iowa, 535.

¹⁴⁶ Mason v. Miles, 68 N. Car. 564.

¹⁴⁷ Chester v. Miller, 18 Cal. 558.

¹⁴⁸ Fullan v. Hooper, 66 How. Pr. 75.
Morris v. Morris, 76 Ga. 733; Partin v. Luterloh, 6 Jones Eq. 341.

inction is struck in the cases that rule that equity will not enjoin the judgment unless it be shown to be inequitable and unjust; if the party merely relies upon a defect of jurisdiction, without attempting to show that the merits are with him also, he must seek his remedy at law.¹⁰⁰

§ 377. Judgment founded on False Return of Service.

Equity may vacate or enjoin the judgment of a court of law, when it is shown to be unjust and that the court rendering it never had jurisdiction of the person of the defendant, although assuming it, in consequence of a false return of service by the sheriff or other officer.¹⁰⁰ In a case in California, where the action was to enforce a tax-lien on land, and there was no service of summons and no appearance by the defendants, and the court commissioner drafted the decree, and either fraudulently or by neglect inserted a clause in the decree that the summons had been served and the judge, deceived by the false recitals in the decree, signed it and ordered it to be entered as the judgment of the court, and at the sheriff's sale under the decree the commissioner became the purchaser and obtained a sheriff's deed, it was held that a court of equity would grant relief to the owner, by restraining the purchaser from setting up the judgment as an estoppel or from using it to perpetuate the advantage he had gained.¹⁰¹ It should be remarked that there is a line of decisions wherein the application of the rule above stated is materially restricted. These cases hold that equity should not grant relief unless the false return of service was procured or induced by the plaintiff, or unless the latter can be in some way connected with the

¹⁰⁰ *Stokes v. Knarr*, 11 Wis. 889; *Gerish v. Hunt*, 66 Iowa, 682, 24 N. W. Rep. 274.

¹⁰⁰ *Miller v. Gorman*, 38 Pa. St. 309; *Brooks v. Harrison*, 2 Ala. 209; *Crafts v. Dexter*, 8 Ala. 767, 42 Am. Dec. 666; *Walker v. Gilbert*, *Freem. Ch.* 85; *Jones v. Bank*, 5 How. (Miss.) 43, 35 Am. Dec. 419; *Ridgeway v. Bank of Tenn.*, 11 Humph. 522; *Ingle v. McCurry*, 1

Heisk. 26; *Bell v. Williams*, 1 Head, 229; *Eatis v. Patton*, 3 Yerg. 381; *Ryan v. Boyd*, 33 Ark. 778; *Owens v. Ramstead*, 22 Ill. 161; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *Newcomb v. Dewey*, 27 Iowa, 381; *Stone v. Skerry*, 31 Iowa, 582; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193.

¹⁰¹ *Martin v. Parsons*, 49 Cal. 95.

deception, thus linking the case supposed with the category of those wherein the defendant was prevented from setting up his defense by the trickery or fraud of his adversary.¹⁵³ The analogy here presented is plausible, but deceptive. For in case the plaintiff is in no fault, and the officer is alone to blame for the false return, these decisions can suggest no remedy except that the defendant should pay the judgment and then bring his action against the officer.¹⁵³ Practically, however, this remedy must often be illusory. And at its best, it involves a circuitry and remoteness of obtaining redress which is foreign to the spirit of equity. But although the main rule for cases of this sort may be regarded as generally well settled, there is a material difference of opinion as to whether the relief will be granted when there still exists a complete and adequate remedy in the original suit. Numerous respectable authorities hold that it should be granted;¹⁵⁴ others that it should be refused.¹⁵⁵ But at all events, before equity will interpose by injunction in a case of this description, it must be averred and proved that the defendant has a meritorious defense, or at least something more than the mere barren right of being permitted to defend.¹⁵⁶

§ 378. Legal Defense not Interposed.

The rule is well settled and perfectly inflexible, that if the defendant in an action at law had a good defense, purely legal in its nat-

¹⁵³ Walker v. Robbins, 14 How. 584; Johnson v. Jones, 2 Nebr. 126; Taylor v. Lewis, 2 J. J. Mar. 400, 19 Am. Dec. 185; Gregory v. Ford, 14 Cal. 188, 73 Am. Dec. 639; Gardner v. Jenkins, 14 Md. 58.

¹⁵³ In Walker v. Robbins, 14 How. 584, it was said: "In cases of false returns affecting a defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there, the party injured must seek his remedy against the marshal."

¹⁵⁴ Landrum v. Farmer, 7 Bush, 46; Caruthers v. Hartsfield, 8 Yerg. 366, 24

Am. Dec. 580; McNairy v. Eastland, 10 Yerg. 309; Connell v. Stilson, 33 Iowa, 147; Hernandez v. James, 23 La. Ann. 483; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193.

¹⁵⁵ Bibend v. Kreutz, 20 Cal. 109; Sanchez v. Carriga, 31 Cal. 170; Comstock v. Clemens, 19 Cal. 77; Chambers v. Bridge Co., 16 Kana. 270; Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451.

¹⁵⁶ Gregory v. Ford, 14 Cal. 188, 73 Am. Dec. 639; Coon v. Jones, 10 Iowa, 131; Secor v. Woodward, 8 Ala. 500; Gardner v. Jenkins, 14 Md. 58; Harris v. Gwin, 10 Sm. & Mar. 563; Fowler v. Lee, 10 Gill & J. 358, 32 Am. Dec. 172.

ure, of the existence of which he was aware, and which he had an opportunity to set up, but neglected to defend himself, he cannot come into equity seeking relief against the judgment in that action, on the same grounds which constituted that defense, unless his failure to make the defense was due to circumstances of fraud, accident, or surprise, entirely unmixed with negligence or fault on his own part.¹⁵⁷ In other words, "a court of chancery will not entertain a party seeking relief against a judgment at law in consequence of his default upon grounds which might have been successfully taken in the said [law] court, unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party be shown why the defense at law was not made."¹⁵⁸ Thus relief in equity was refused in a case where the defendant had a good defense of a discharge under the bankrupt act, but neglected to answer or plead it because the plaintiff had commenced the suit

¹⁵⁷ *Hungerford v. Sigerson*, 20 How. 156; *Wynn v. Wilson*, 1 Hempst. 696; *New Orleans v. Morris*, 3 Woods, 103; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604; *Tyler v. Hamersley*, 44 Conn. 419; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, 1 Am. Dec. 131; *Foster v. Wood*, 6 Johns. Ch. 86; *Mills v. Van Voorhis*, 10 Abb. Pr. 10; *Katz v. Moore*, 13 Md. 566; *Ewing v. Nickle*, 45 Md. 413; *Lyday v. Douple*, 17 Md. 188; *Huston v. Ditto*, 20 Md. 305; *Harnsbarger v. Kinney*, 13 Gratt. 511; *Smith v. McLain*, 11 W. Va. 654; *Jackson v. Patrick*, 10 S. Car. 207; *Robbins v. Mount*, 3 Ga. 74; *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 733; *Vaughn v. Fuller*, 23 Ga. 366; *Neal v. Henderson*, 73 Ga. 209; *Foster v. State Bank*, 17 Ala. 673; *Thomas v. Phillips*, 4 Sm. & Mar. 356; *Williams v. Jones*, 10 Sm. & Mar. 106; *Semple v. McGatagan*, 10 Sm. & Mar. 96; *Scroggins v. Howarth*, 23 Miss. 514; *Ship v. Wheelless*, 33 Miss. 646; *Jordan v. Thomas*, 34 Miss. 73, 69 Am. Dec. 387; *Gainey v. Kennedy*, 53 Miss. 108; *Minor v. Stone*, 1 La. Ann. 283; *Todd v. Fisk*, 14 La. Ann. 13; *McRae v. Purvis*, 12 La. Ann. 85; *Gibson*

v. Moore, 23 Tex. 611; *Jordan v. Corley*, 43 Tex. 284; *Prewitt v. Perry*, 6 Tex. 260; *Coffee v. Ball*, 49 Tex. 16; *Smith v. Durrett, Sneed*, (Ky.) 236, 2 Am. Dec. 714; *Cowan v. Price*, 1 Bibb, 173, 4 Am. Dec. 627; *Paynter v. Evans*, 7 B. Mon. 420; *Galbraith v. Martin*, 5 Humph. 50; *Brandon v. Green*, 7 Humph. 130; *Andrews v. Fenter*, 1 Ark. 186; *Lester v. Hoskins*, 26 Ark. 63; *Bently v. Dillard*, 6 Ark. 79; *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696; *Menifee v. Ball*, 7 Ark. 520; *Raburn v. Shortridge*, 2 Blackf. 480; *Skinner v. Deming*, 3 Ind. 558, 54 Am. Dec. 463; *Smith v. Powell*, 50 Ill. 21; *Higgins v. Bullock*, 73 Ill. 205; *Johnson v. Lyon*, 14 Iowa, 481; *Faulkner v. Campbell*, 1 Morris (Iowa), 148; *Collier v. Easton*, 3 Mo. 146; *Kelly v. Hurt*, 74 Mo. 561; *Kelleher v. Boden*, 55 Mich. 295, 21 N. W. Rep. 346; *Sargeant v. Bigelow*, 24 Minn. 870; *Snyder v. Vannoy*, 1 Oreg. 344; *Marsh v. Edgerton*, 1 Chand. (Wis.) 198; *Phelps v. Peabody*, 7 Cal. 50; *Agard v. Valencia*, 39 Cal. 292.

¹⁵⁸ *Braden v. Reitzenberger*, 18 W. Va. 286; *Nevins v. McKee*, 61 Tex. 412.

before his discharge in bankruptcy, and continued it, unknown to him, from term to term, until after his discharge, before taking judgment; for he knew of the institution of the suit and was bound to notice everything else that was done.¹⁵⁹ Nor will equity relieve because the party did not prove on the trial payments which he alleges he had made, unless he shows some fraud or circumvention practised to prevent his making the proof.¹⁶⁰ Nor because the promissory note upon which judgment was rendered was without consideration.¹⁶¹ That the legal defense was not presented or considered through the oversight of counsel or the error of the judge, or the failure on the part of the defendant to collect the evidence in due season and present it in a way to be available, is no sufficient excuse.¹⁶² And if the defendant is precluded from setting up in equity defenses which he *might* have made available at law, much less can he urge, as a ground for relief in equity, any defenses which actually *were* tried and determined at law. Equity will invariably decline to re-examine a question which was fully and fairly examined at law. The decision, however inequitable it may appear, is final, and the matter is *res judicata*.¹⁶³ Hence a judgment obtained without fraud or mistake, upon issue joined and after litigation, will be interfered with by a court of equity only when it appears, first, that to allow its execution would be against equity and good conscience, and second, that the facts rendering it thus inequitable were not available as a defense in the action in which the judgment was recovered.¹⁶⁴

¹⁵⁹ Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221.

¹⁶⁰ Deaver v. Erwin, 7 Ired. Eq. 250; Harnsbarger v. Kinney, 13 Gratt. 511.

¹⁶¹ Garrison v. Cobb, 106 Ind. 245, 6 N. E. Rep. 332.

¹⁶² Lebanon Mut. Ins. Co.'s Appeal (Pa.), 1 Atl. Rep. 559.

¹⁶³ Bateman v. Willoe, 1 Sch. & Lef. 204; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Truly v. Wanzer, 5 How. 141; Hendrickson v. Hinckley, 17 How. 443; Forsythe v. McCreight, 10 Rich.

Eq. 306; More v. Bagley, Breese, 60, 12 Am. Dec. 144; Yongue v. Billups, 23 Miss. 407; Briesch v. McCauley, 7 Gill, 189; Brown v. Wilson, 56 Ga. 534; White v. Cahal, 2 Swan, 550; Simpson v. Hart, 1 Johns. Ch. 97; Emerson v. Udall, 13 Vt. 477; Agard v. Valencia, 89 Cal. 292; Foster v. State Bank, 17 Ala. 672; Snyder v. Vannoy, 1 Oreg. 344; Sumner v. Whitley, 1 Mo. 708; Matson v. Field, 10 Mo. 100.

¹⁶⁴ Clute v. Potter, 37 Barb. 199.

§ 379. Illegality of Consideration.

In regard to judgments rendered upon a contract which was inherently illegal or immoral, there has been some difference of opinion as to whether equity ought not to relax the strictness of the rule stated above, and enjoin such judgments, irrespective of the fact that such illegality of the consideration might and should have been set up as a defense at law. Some cases are to be found in which relief has been thus granted where the judgment was founded upon usury.¹⁰⁵ But the more favored opinion is that where the defense of usury was open to the defendant at law and he had an opportunity to set it up, but neglected to do so, equity will not relieve.¹⁰⁶ There are also precedents for the intervention of equity to annul gaming contracts, though the defense could have been interposed at law.¹⁰⁷ In Illinois, a statute provides that all judgments, mortgages, bonds, notes, etc., given or executed for any money won by gaming, may be set aside by any court of equity upon bill filed for that purpose by the person giving, entering into, or executing the same, or by any other person interested therein. This, it is held, applies as well to judgments rendered in contested actions as to judgments on confession. And, such a suit being authorized by statute, the fact that the illegality of the contract sued on would have constituted a good defense to the action in which the judgment was recovered, does not oust the court of chancery of jurisdiction.¹⁰⁸ In a recent case it was held that a bill would lie to enjoin the plaintiff from collecting a judgment confessed five years previously, under a warrant of attorney in a bond, the defendant having had no day in court, upon the ground that the consideration of the bond was an agreement to suppress a prosecution for a felony.¹⁰⁹ But the supreme federal court holds, and with

¹⁰⁵ *Frierson v. Moody*, 8 Humph. 561.

¹⁰⁶ *Lucas v. Spencer*, 27 Ill. 15; *Chinn v. Mitchell*, 2 Met. (Ky.) 92; *Brown v. Toell*, 5 Rand. 543, 16 Am. Dec. 759.

¹⁰⁷ *Woodson v. Barrett*, 2 Hen. & M. 86; *Skipwith v. Strother*, 3 Rand. 214; *Clay v. Fry*, 8 Bibb. 243, 6 Am. Dec. 654.

¹⁰⁸ Rev. Stats. Ill. c. 83, § 135; *West v. Carter* (Ill.), 21 N. E. Rep. 782; *Mallett v. Butcher*, 41 Ill. 882; *Lucas v. Nichols*, 66 Ill. 41. See also *Lucas v. Waul*, 12 Sm. & Mar. 157.

¹⁰⁹ *Given's Appeal*, 121 Pa. St. 260, 15 Atl. Rep. 468. And see *Heath v. Cobb*, 2 Dev. Ch. 187.

undoubted justice, that equity should not relieve against a judgment at law on the ground that it was founded on a consideration illegal and expressly forbidden by the laws of the state, when the party applying for relief was *in pari delicto* with the other; "a position," says the court, "which, however it might shield him against attempts from associates in wrong, so far as these should be urged through the instrumentality of courts of justice, can invest him with no rights, either at law or in equity, as against advantages acquired by his confederates." ¹⁷⁰

§ 380. Excuses for not defending at Law.

Among the excuses for not making one's defense at law which are generally considered as sufficient to justify the interference of equity are the following:—fraud, circumvention, or any other improper act of the other party whereby a defense was presented; mistake, surprise, or accident; and justifiable ignorance of the facts constituting a defense. Some of these have already been considered, and the others will be considered in their order. But first it is necessary to advert to certain kinds of excuses which have been adjudged inadequate, and to the manner of satisfying the court of the existence of a valid excuse. That the debtor had a valid defense, but was advised by his counsel that it was not necessary to bring it forward before the court, is unanimously condemned as insufficient to warrant the intervention of a court of chancery.¹⁷¹ So when the grounds relied on in equity are equally available at law, it is no ground for relief that parties, who were not at the time of the trial examinable as witnesses, have since been made so by statute.¹⁷² If a party, having a good defense at law, by his own voluntary act deprives himself of the means of making it, a court of equity will not interpose in his behalf; as where a party, having a good defense to a note, voluntarily executes a deed of trust to secure its payment, equity will not enjoin the execution of the trust on account of such defense to the

¹⁷⁰ Sample v. Barnes, 14 How. 70; 70; Brown v. Wilson, 56 Ga. 584; Shrick-
Creath v. Sims, 5 How. 192. er v. Field, 9 Iowa, 367.

¹⁷¹ Duckworth v. Duckworth, 35 Ala.

¹⁷² Kendall v. Winsor, 6 R. L. 453.

original note.¹⁷³ In regard to the evidence to prove the state of facts alleged as an excuse for the party's failure to make his defense at law, it is said that "the same certainty of proof is not required to establish an excuse for not making the defense at law that would be demanded to establish the existence of that defense."¹⁷⁴ Yet as it is the excuse, and not the defense, which must be established at this stage of the proceedings, it is of no avail to prove the defense if the excuse remains without evidence to support it. For example, where A. pays a debt for which he and B. are liable, and afterwards recovers a judgment at law against B. for half the amount, and on a bill by B. for relief against the judgment, on the ground that he was surety for A. in the debt, he fails to prove his alleged reason for not making the defense at law, but proves that he was surety for A., there can be no relief afforded to him in equity.¹⁷⁵

§ 381. Same; Mistake.

A mistake of *fact*, provided it be honest and genuine, and such as a man might reasonably make, will be a sufficient excuse for not defending an action at law, and will warrant a court of equity, if the judgment be against conscience, in interposing by injunction to restrain its enforcement.¹⁷⁶ For instance, where A., a creditor of B., called upon the latter to execute a bond with surety for the debt, and supposing himself authorized by the conversation, applied to C. to execute the bond as surety, who did so accordingly, and A. subsequently recovered judgment on the bond, it was held, upon a bill by C. showing that A.'s representation of his authority from B. was made under a mistake, that the judgment should be enjoined as against C.¹⁷⁷ But it is no ground for relief in equity that the party was prevented from making his defense at law by a mistake of *law*,

¹⁷³ Fanning v. Farmers' Bank, 8 Sm. & Mar. 139.

¹⁷⁴ Rice v. Bank, 7 Humph. 39.

¹⁷⁵ Turner v. Davis, 7 Leigh, 237, 30 Am. Dec. 502.

¹⁷⁶ Bibend v. Kreutz, 20 Cal. 109; Chase v. Manhardt, 1 Bland Ch. 350; Ford v.

Ford, Walker, 505, 12 Am. Dec. 587; Drew v. Clarke, Cooke, 373, 5 Am. Dec. 698; Partridge v. Harrow, 27 Iowa, 96; Wilson v. Boughton, 50 Mo. 17; Kohn v. Lovett, 48 Ga. 180.

¹⁷⁷ Bird v. Chaffin, 1 Dev. & Bat. Ch. 55.

although it was a mutual mistake of both parties to the suit.¹⁷⁸ Nor that the defendant mistook his rights and so failed to make a defense which it was competent for him to present at law.¹⁷⁹ Nor will equity interfere because of his ignorance of the nature of the proceeding against him and a misapprehension of what was necessary to charge him.¹⁸⁰ Nor because he misunderstood the nature of the action and because those interested in the matter were out of the county.¹⁸¹ Nor will relief be granted where the defendant, misnamed in the process, was in court when the judgment was rendered against him by default, and failed to defend by advice of his counsel.¹⁸² Where an application for relief is made upon this ground, due diligence must be shown and the facts set forth showing how the omission occurred.¹⁸³

§ 382. Same; Surprise.

In the cases where surprise has been accepted as a sufficient excuse for not defending at law, it has generally transpired that the surprise was one intentionally prepared by the plaintiff and sprung upon the defendant at the trial, whereby the case is assimilated to that of a fraud or trick on the former's part. Thus, in an early case, the payee of an usurious note pretended to have sold and transferred the same to a third person, in whose name a suit at law was brought upon the note, whereby the makers of the note were induced to suppose that the payee of the note could be examined by them as a witness in that suit to prove the usury, but such payee, when called as a witness at the trial, testified that he was one of the real plaintiffs in interest in the suit, and declined to testify as to the alleged usury, and from the state of the pleadings he could not be examined as a plaintiff under the statute for the prevention of usury. It was held that the defendants in that suit could maintain a bill in chancery against the real plaintiffs in the suit at law for discovery and relief, upon the ground that they had been deceived

¹⁷⁸ *Richmond v. Shippen*, 2 Pat. & H. 827; *Meem v. Rucker*, 10 Gratt. 506; *Hubbard v. Martin*, 8 Yerg. 498.

¹⁷⁹ *Dickerson v. Commissioners*, 6 Ind. 128, 68 Am. Dec. 873.

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¹⁸⁰ *Meem v. Rucker*, 10 Gratt. 506.

¹⁸¹ *State Bank v. Stanton*, 2 Gilm. 353.

¹⁸² *Graham v. Roberts*, 1 Head, 56.

¹⁸³ *Simmons v. Martin*, 53 Ga. 620.

and defrauded out of their defense at law.¹⁸⁴ But an injunction will not be allowed on the ground of surprise, where there was no surprise but such as the party might have reasonably anticipated.¹⁸⁵ And a party seeking relief in equity on this ground must show that the surprise was not in consequence of his own negligence.¹⁸⁶ Thus it is no excuse that the witness on whom the defendant relied, but whom he had never questioned, failed to prove the defense set up.¹⁸⁷ So the fact that the party's counsel was surprised by the production of a certain piece of evidence is no ground for relief in equity, if he was previously cognizant of the evidence.¹⁸⁸ On the same principle, surprise of a party or his counsel, at the fact that the supreme court refused to review the judgment of the circuit judge, under a stipulation of the parties which had, in effect, made the decision of such judge final, is no ground for equitable interference with the judgment.¹⁸⁹

§ 383. Same; Accident or Misfortune.

Unavoidable accident or misfortune, preventing the party from making his defense at law, is a sufficient ground for the interference of equity in an otherwise meritorious case.¹⁹⁰ This, it will be remembered, is one of the grounds specified in the statutes of some of the states as authorizing the vacation of a judgment on motion in the court where rendered.¹⁹¹ It may be stated that equity is guided by practically the same rules which have been applied by the courts of law in construing these statutes, except, perhaps, that the lines are rather more closely drawn in equity, and less indulgence is shown in respect to the kinds of accident which are accepted as sufficient excuses, and in respect to the possibility of the party's surmounting the obstacle and making his defense. A few illustrative cases may follow here. It has been broadly held that the sickness of a party,

¹⁸⁴ *Post v. Boardman*, 10 Paige. 580.

¹⁸⁵ *Fowler v. Roe*, 11 N. J. Eq. 367;
Shannon v. Reese, 33 Ala. 536.

¹⁸⁶ *Lawson v. Bettison*, 13 Ark. 401.

¹⁸⁷ *Williams v. Lockwood*, 1 Clark Ch.

172.

¹⁸⁸ *Gibson v. Watts*, 1 McC. Ch. 490.

¹⁸⁹ *Farmers' Loan Co. v. Walworth Bank*, 33 Wis. 249.

¹⁹⁰ *Kersey v. Rash*, 3 Del. Ch. 321.

¹⁹¹ *Supra*, §§ 337-340.

or the pendency of another suit against him requiring his attendance, will not authorize the interference of equity.¹⁹² And this is undoubtedly true, if it would have been possible for him to be represented by counsel. Floods, which prevented him from reaching the place of trial, will furnish a sufficient excuse, but only in case the bill is very explicit as to the time of the prevalence of high water and of the meeting and adjournment of court, and as to the efforts that were made to reach it, and as to the impossibility of a successful defense in the absence of the defendant.¹⁹³ In another case, equity refused to enjoin a judgment on the ground that the defendant was precluded by intense excitement prevailing in the country from attending court, that it was dangerous to travel from home, that it was generally understood there would be no court, and that the judge of the court said that he should hold no session for the trial of cases.¹⁹⁴ It should be remarked, in this connection, that a good excuse for not being present at the term at which judgment was rendered, is not sufficient where no counsel was employed, nor witnesses summoned, nor any other steps taken to defend the action.¹⁹⁵ The inability of the party's attorney to attend the court, or his sickness, may, under some circumstances, entitle the party to relief in equity;¹⁹⁶ but it is no ground for an injunction that defendant's counsel was absent, when it appears that the defendant, if present at the trial, might have employed other counsel equally competent.¹⁹⁷ So the death of defendant's original counsel, and want of familiarity, on the part of the counsel who succeeds him, with the grounds of the defense, do not furnish a sufficient reason for equity to enjoin the enforcement of the judgment.¹⁹⁸ On the other hand, equity has thought it proper to give relief on account of the loss of a written contract without which the defense at law

¹⁹² *Phar v. Reynolds*, 8 Ala. 521. But where the defendant was taken sick on the way to trial and was thereby prevented from making affidavit to the loss of certain papers, and the court, in consequence, refused to admit secondary evidence of them, he was relieved in equity from the judgment against him. *Hord v. Dishman*, 5 Call, 279.

¹⁹³ *English v. Savage*, 14 Ala. 342; *Brooks v. Whitson*, 15 Miss. 513.

¹⁹⁴ *George v. Tutt*, 36 Mo. 141.

¹⁹⁵ *McCollum v. Prewitt*, 1 Ala. Sel. Cas. 498; *Cole v. Hundley*, 16 Miss. 473.

¹⁹⁶ *McBroom v. Sommerville*, 2 Stew. 515.

¹⁹⁷ *Crim v. Handley*, 94 U. S. 652; *Mock v. Cundriff*, 6 Port. 24.

¹⁹⁸ *Powell v. Stewart*, 17 Ala. 712.

could not be made;²⁹⁹ but has refused its aid where it was not satisfied that the loss of the particular document would endanger the complainant's defense in the court of law.³⁰⁰ In a case where parties were prevented from making their defense at law by the acts of the plaintiff, until the only witness by whom the defense could be proved was dead, and a resort to a court of chancery in consequence thereof became indispensable, it was held that they were entitled to relief in that court.³⁰¹ But the fact that a witness omitted, in giving his testimony, to state a material fact, and that the complainant, by reason of his deafness, did not know of such omission until after the trial, is no ground for relief.³⁰²

§ 384. Ignorance of Legal Defense.

It may be regarded as well settled, upon the authorities, that equity will grant relief against a judgment at law where it is shown that there is a good and valid defense to the action on the merits, of which the defendant was ignorant at the time of the trial, and which he could not have discovered, by the exercise of reasonable and proper diligence, in time to set it up at law.³⁰³ For example, where an administrator has recovered judgment for the purchase money of property of his intestate sold by him, it is a sufficient excuse to the vendee for not defending at law, that he did not know until after the judgment was rendered that the administrator had no authority to sell.³⁰⁴ So where the creditor obtains a judgment at law against the sureties before they have notice of an agreement to forbear suit, equity will enjoin its collection.³⁰⁵ But it is an important corollary

²⁹⁹ *Vathir v. Zane*, 6 Gratt. 246.

³⁰⁰ *Rogers v. Cross*, 8 Chand. 84.

³⁰¹ *Mack v. Doty*, Harr. Ch. (Mich.) 366.

³⁰² *Stone v. Moody*, 6 Yerg. 81.

³⁰³ *Davis v. Tileston*, 6 How. 114; *Garratt v. Lynch*, 45 Ala. 211; *Wales v. Bank of Michigan*, Harr. Ch. (Mich.) 808; *Hubbard v. Hobson*, Breese, 147; *Jones v. Kilgore*, 2 Rich. Eq. 68; *Pearce v. Chastain*, 8 Ga. 226, 46 Am. Dec. 423;

Inglehart v. Lee, 4 Md. Ch. 514; *Baltzell v. Randolph*, 9 Fla. 386; *Meek v. Howard*, 10 Sm. & Mar. 502; *Brown v. Luehlers*, 79 Ill. 575; *Wells v. Wall*, 1 Oreg. 295; *Ludington v. Handley*, 7 W. Va. 269; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Rust v. Ware*, 6 Gratt. 50. ³⁰⁴ *Crisman v. Beasley*, 1 Sm. & Mar. Ch. 561.

³⁰⁵ *Armistead v. Ward*, 2 Pat. & H. 504.

to the above rule—or, indeed, an integral part of the rule—that mere ignorance of his defense is not sufficient; it must be shown that the party is guilty of no negligence, and that he could not possibly have ascertained it by the exercise of careful and reasonable diligence.²⁰⁶ It must appear that the defendant's ignorance was not due to any lack of diligence on his part, or that it was caused by the act of the opposite party.²⁰⁷ "A party who seeks the aid of a court of chancery, after a judgment at law against him, on the ground that he was ignorant of the defense, must show the exercise of ordinary diligence to discover it; or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part."²⁰⁸ Thus an alteration in an instrument sued on at law may be taken advantage of there, and the failure of the defendant to discover the alteration until after judgment is no ground for relief in equity.²⁰⁹ So the allegation that there was a mistake in an account, upon which a judgment at law was recovered, which was not discovered until after the trial and verdict, is not sufficient to authorize an injunction against the judgment.²¹⁰ Nor is it any ground for relief in equity that defendant did not know, at the time of the trial at law, what the legal criterion of damages was.²¹¹

§ 385. Discovery must have been sought.

It is no excuse for failure to set up a legal defense in the action at law that the defendant could not make it available without invoking the aid of chancery to get a discovery; he should have obtained such discovery before going to trial at law.²¹² This principle was once

²⁰⁶ *Brown v. Swann*, 11 Wheat. 497; *Avery v. U. S.*, 12 Wall. 804; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 838; *McColum v. Prewitt*, 37 Ala. 578; *Taylor v. Sutton*, 15 Ga. 108; *Leggett v. Morris*, 6 Sm. & Mar. 728; *Slack v. Wood*, 9 Gratt. 40; *Taliaferro v. Bank*, 23 Ala. 755; *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 468; *McCown v. Macklin*, 7 Bush, 808; *Thompson v. Berry*, 8 Johns. Ch.

895; *Tutt v. Ferguson*, 18 Kans. 45; *Garrett v. Lynch*, 45 Ala. 204.

²⁰⁷ *Carolus v. Koch*, 72 Mo. 645.

²⁰⁸ *Stinnett v. Branch Bank*, 9 Ala. 120.

²⁰⁹ *Shelmire v. Thompson*, 2 Blackf. 270.

²¹⁰ *Falls v. Robinson*, 5 Md. 365.

²¹¹ *McKean v. Read*, 6 Litt. 395, 12 Am. Dec. 318.

²¹² *Norton v. Woods*, 5 Paige, 249;

stated by Chancellor Walworth in the following terms: "As a general rule, if a party against whom an action is brought has a legal defense, he must avail himself of it in the suit at law. It will be too late, after he has suffered a judgment to be recovered against him there, to apply to this court for relief. And even where the facts constituting the legal defense can only be established by a discovery from the plaintiff, if they are fully known to the defendant, and he can avail himself of them upon the trial by the aid of a bill of discovery, he should resort to that mode of defense when the necessity of it is apparent, or he may be precluded by the judgment in that suit. In cases of this kind, however, this court will accept of a satisfactory excuse for not resorting to a bill in the first instance, and may grant relief after judgment has been obtained in the suit at law."²³

§ 386. Newly-discovered Evidence.

On principles analogous to those just considered, it is held that where the defendant knew of his defense at the time of the trial at law, but had no evidence to support it, was ignorant that any such evidence existed, and could not have discovered it by the exercise of due diligence, equity will grant him relief upon the ascertainment and production of such evidence.²⁴ But here, it is obvious, any court would be slow to pardon any negligence or sloth on the part of the defendant in seeking for the evidence which he needs. Being

Bartholomew v. Yaw, 9 Paige, 165; *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 732; *Albritton v. Bird*, R. M. Charl. 98; *Barker v. Elkins*, 1 Johns. Ch. 465. See also *Norris v. Hume*, 2 Leigh, 334, 21 Am. Dec. 681; *Brown v. Swann*, 10 Pet. 497; *Green v. Massie*, 21 Gratt. 838.

²³ *Norton v. Woods*, 5 Paige, 249. An exactly opposite view was taken in *Deputy v. Tobias*, 1 Blackf. 811, 12 Am. Dec. 242, where Holman, J., said: "But a bill of discovery is the *dernier resort* in obtaining testimony, inasmuch as when it is resorted to, it shuts the door against every other method. Therefore it is purely discretionary with every

suitor whether he will file such a bill or not, and he can never be considered in laches for not seeking a discovery from the opposite party."

²⁴ *Alley v. Ledbetter*, 1 Dev. Ch. 458; *Levan v. Patton*, 2 Heisk. 106; *Cox v. Railroad*, 44 Ala. 611; *McGehee v. Gold*, 68 Ill. 215; *Rust v. Ware*, 6 Gratt. 50, 52 Am. Dec. 100; *Inglehart v. Lee*, 4 Md. Ch. 514; *Foote v. Silsby*, 1 Blatchf. 545; *Taylor v. Sutton*, 15 Ga. 108; *Pearce v. Chastain*, 8 Ga. 226; *Mills v. Van Voorhis*, 10 Abb. Pr. 10; *Mellick v. First Nat. Bank*, 52 Iowa, 94, 2 N. W. Rep. 1021. *Per contra*, *Gusman v. De Poret*, 83 La. Ann. 383.

aware that he has a good legal defense, it is his duty, as well as his interest, to make the most careful and exhaustive efforts to arm himself with the testimony which will support it. If he has not done this,—if he has been negligent in the search for evidence,—equity will not relieve him.²¹⁵ And the substance of the newly-discovered evidence must be set forth in the bill, in order that the chancery court may judge whether it is of the requisite character and weight.²¹⁶ In regard to the last point, the circumstances under which equity will grant a new trial because of newly-discovered evidence have been summed up as follows: (1) The evidence must have been discovered since the trial. (2) It must be evidence that could not have been discovered before the trial by the plaintiff or defendant, as the case may be, by the exercise of reasonable diligence. (3) It must be material in its object, and such as ought, on another trial, to produce an opposite result on the merits. (4) It must not be merely cumulative, corroborative, or collateral.²¹⁷ It remains to be stated that the statutory provisions, in many of the states, authorizing the law courts to grant new trials on the ground of newly-discovered evidence, do not divest the courts of equity of the power to grant a new trial in cases where the facts will justify it.²¹⁸

§ 387. Negligence of Party precludes Relief.

A litigant is required to exercise the greatest degree of watchfulness over the progress of his case in court; and if he fails to attend the trial and assert his rights, merely in consequence of his own opinion of the state of the docket, or through forgetfulness, or negligence of any other kind, he will have no standing in equity after a judgment.²¹⁹ That he omitted to defend the suit in consequence of

²¹⁵ *Taylor v. Bradshaw*, 6 T. B. Mon. 145, 17 Am. Dec. 132; *Glover v. Hedges*, 1 N. J. Eq. 118; *McCaulis v. Duval*, 69 Ga. 744.

²¹⁶ *Miller v. McGuire*, 1 Morris (Iowa), 150.

²¹⁷ *Wynne v. Newman*, 75 Va. 816. The evidence must be of such a conclusive character that if it had been of-

ferred it would have produced a different result. *Bloss v. Hull*, 27 W. Va. 503.

²¹⁸ *Hone v. Queen*, 4 Nebr. 108; *Colyer v. Langford*, 1 A. K. Mar. 237; *Duncan v. Lyon*, 8 Johns. Ch. 356; *Baltzell v. Randolph*, 9 Fla. 366.

²¹⁹ *Warner v. Conant*, 24 Vt. 351, 53 Am. Dec. 178; *Yancey v. Downer*, 5

being misled by the clerk of the court as to its character, is considered as inexcusable negligence.²²⁰ So, where a garnishment suit is pending, but is not prosecuted to judgment for two terms after that to which it was made returnable, the garnishee has no right to think that the suit is abandoned as to him and settle his debt, and if he does so, equity will not grant him relief from a judgment subsequently obtained against him in the garnishment suit.²²¹ So where a defendant at law, having a good legal defense, merely writes to counsel to defend him, without instructing him in his defense, he is guilty of such neglect as to preclude relief in equity against a judgment.²²² But a distinction must be taken between such neglect as is attributable solely to the party himself and such as is brought about by the improper or deceitful conduct of the other side. The former is not excusable, the latter sometimes is. Thus, in a case where the complainant's name had been forged on a note and he was sued upon it; and one of the makers of the note sent him word that he need not trouble himself about it, as the other makers would pay it; and the sheriff also told him that there was no necessity of his appearing at the first term; and the other makers put in a plea for all at the return term; and the complainant was sick and unable to attend or employ counsel; but the other makers withdrew their plea and allowed judgment to go by default; and the plaintiff knew that the complainant's name was forged; it was held that the latter was not guilty of such negligence as would preclude him from having the judgment at law set aside upon a bill in equity.²²³

§ 388. Defense not available at Law.

Thus far we have been speaking only of defenses purely legal in their character and which could have been interposed in the action at law. But where the case varies from this type, entirely different

Litt. 8, 15 Am. Dec. 85; *Stroup v. Sullivan*, 2 Ga. 275, 46 Am. Dec. 389. And see *Briggs v. Smith*, 5 R. L. 218; *McVicar v. Filer*, 81 Mich. 804.

²²⁰ *Hanna v. Morrow*, 48 Ark. 107.

²²¹ *Stroup v. Sullivan*, 2 Ga. 275, 46 Am. Dec. 389.

²²² *Stanard v. Rogers*, 4 Hen. & M. 438; *Hill v. Bowyer*, 18 Gratt. 364; *Sanders v. Fisher*, 11 Ala. 812.

²²³ *Rowland v. Jones*, 2 Heisk. 321.

rules apply. If the matter relied on by the complainant could not have been received as a defense in the trial at law, because it fell within the exclusive jurisdiction of chancery, or by reason of the forms of legal procedure, equity will relieve notwithstanding there may have been an ineffectual attempt to defend at law.²²⁴ And where the defendant has both a legal defense and an equitable defense, the latter not cognizable at law, a failure to use diligence in making his legal defense will not, it seems, prevent a court of equity from granting an injunction upon proof of the equitable defense, in case a judgment is rendered against him.²²⁵ The most difficult question under this head arises in connection with the codes of practice, enacted in several of the states, which confer large equitable powers upon the courts of law. One decision holds that such a statute merely permits, but does not require, an equitable defense to be made to an action on a legal demand; and therefore, if the defendant fails to avail himself of this privilege, and permits a judgment to go against him, he may still bring an equitable action to obtain relief against the judgment.²²⁶ Notwithstanding the plausibility of this reasoning, it is opposed by the weight of the authorities, which rule that the fact that a defense is equitable is no excuse for not setting it up at law, if available under the code.²²⁷

§ 389. Defense available either at Law or Equity.

There is a third possibility in regard to the character of the defense to the action; it may be one that is equally available either at law or in equity. In this event, where the defense is a matter of which courts of law and equity have concurrent jurisdiction, it is generally held that the party may choose the forum in which to make his

²²⁴ *Crim v. Handley*, 94 U. S. 652; *Hendrickson v. Hinckley*, 17 How. 443; *Ferriday v. Selcer*, 1 Freem. Ch. 258; *Calloway v. McElroy*, 8 Ala. 406; *Clifton v. Livor*, 24 Ga. 91; *King v. Baldwin*, 17 Johns. 884, 8 Am. Dec. 415; *Venum v. Davis*, 85 Ill. 568; *Dunham v. Downer*, 81 Vt. 249; *Kersey v. Rash*, 8

Del. Ch. 821; *Newton v. Field*, 16 Ark. 216.

²²⁵ *Cornelius v. Thomas*, 1 Tenn. Ch. 283; *Winchester v. Gleaves*, 8 Heyw. 218.

²²⁶ *Dorsey v. Reese*, 14 B. Mon. 157.

²²⁷ *Kelly v. Hurt*, 74 Mo. 561; *Winfield v. Bacon*, 24 Barb. 154; *Savage v. Allen*, 54 N. Y. 458.

defense, and if he omits to do so at law, he may then have recourse to equity for relief against the judgment.²²⁸ Thus, in some of the states, equity will relieve against a judgment at law, by default, for money won at gaming, because here the jurisdiction of law and equity is concurrent, and the party may have his election where he will set up his defense; and if he so chooses he may let judgment go by default at law, and then resort to equity; although it would of course be otherwise if he had presented his defense at law and failed.²²⁹ For if, in any case where the jurisdiction of law and equity is concurrent, the party makes his defense in the trial at law, he will be regarded as having made his election; and if he fails he will have no ground for a bill in equity for relief against the judgment, unless his defeat transpired through fraud or accident.²³⁰ And this election is manifested, it is said, "by offering any defense whatever, it matters not whether by demurrer to the declaration, or by plea in abatement or in bar."²³¹ But it is also held that if there is a doubt whether a defense is available at law, and there is an undoubted jurisdiction in equity, and at law the defendant omits to make his defense, or if he makes it and it is overruled on the ground that it cannot be considered at law, a court of equity may afford relief, notwithstanding a trial at law.²³²

§ 390. Satisfaction or Release of Judgment.

Payment, release, or discharge of the claim on which a suit is founded must generally be set up as a defense before judgment. It

²²⁸ Harlan v. Wingate, 2 J. J. Mar. 188; Dorsey v. Reese, 14 B. Mon. 157; Morrison v. Hart, 2 Bibb, 4, 4 Am. Dec. 668; Hempstead v. Watkins, 6 Ark. 817, 42 Am. Dec. 696; Bently v. Dillard, 6 Ark. 79; Rathbone v. Warren, 10 Johns. 587. But compare Vaughn v. Johnson, 9 N. J. Eq. 178; Galbraith v. Martin, 5 Humph. 50.

²²⁹ Clay v. Fry, 3 Bibb, 248, 6 Am. Dec. 654; Lucas v. Nichols, 66 Ill. 41; Gough v. Pratt, 9 Md. 526; Collins v. Lee, 2 Mo. 16. See *supra*, § 379.

²³⁰ Haughey v. Strang, 2 Port. 177, 27 Am. Dec. 648; Dutil v. Pacheco, 21 Cal. 438, 82 Am. Dec. 749; Burton v. Hynson, 14 Ark. 82; Dickson v. Richardson, 16 Ark. 114; Morrison v. Hart, 2 Bibb, 4, 4 Am. Dec. 668; Dunham v. Downer, 81 Vt. 249.

²³¹ Le Guen v. Gouverneur, 1 Johns. Cas. 505, 1 Am. Dec. 121.

²³² King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415.

forms no exception to the rule that matters cannot be heard on a bill in equity which might have been pleaded in the action at law, unless the party was prevented from bringing them before the court by fraud or accident, without his own fault or negligence.²²² But payment made after the institution of suit, where it cannot be brought to the notice of the court before judgment, under the local practice, is good ground for enjoining the judgment.²²⁴ Whether a bill in equity for an injunction is the proper remedy to prevent a judgment-plaintiff from proceeding to collect anew a judgment which has been in fact satisfied, has been disputed. Some of the cases hold that such an application is meritorious and should be allowed.²²⁵ But others, and we think with better reason, consider that equity ought not to interfere in such a case, inasmuch as the party has a prompt and adequate remedy at law.²²⁶ But it is held that a court of equity will relieve against the suing out or levy of any process of execution upon a judgment enjoined which has been discharged by proceedings in bankruptcy.²²⁷

§ 391. Injunction as a Means of securing Set-Off.

As equity may order one judgment to be set off against another, so also it has power to restrain the execution of a judgment when it is made to appear that the judgment-defendant has a debt against the plaintiff exceeding the judgment in amount and that the latter is insolvent.²²⁸ But a bill for this purpose cannot be sustained on the mere ground that the defendant has claims against the plaintiff which might be the subject of set-off, if there is no averment to show that the former for any reason could not have availed himself of his right of set-off in the action in which the judgment against him was recov-

²²² *Foster v. Wood*, 6 Johns. Ch. 90; *Duncan v. Lyon*, 8 Johns. Ch. 356, 8 Am. Dec. 513.

²²⁴ *Humphreys v. Leggett*, 9 How. 297; *Florat v. Handy*, 35 La. Ann. 816.

²²⁵ *Bowen v. Clark*, 46 Ind. 405; *Shaw v. Dwight*, 16 Barb. 536; *Mallory v. Norton*, 21 Barb. 424.

²²⁶ *McRae v. Davis*, 5 Jones Eq. 140;

Perrine v. Carlisle, 19 Ala. 636; *Lansing v. Eddy*, 1 Johns. Ch. 49.

²²⁷ *Peatross v. McLaughlin*, 6 Gratt. 64.

²²⁸ *McClellan v. Kinnaird*, 6 Gratt. 352. And see also *Hinrichsen v. Reinback*, 27 Ill. 295; *Sumner v. Whitley*, 1 Mo. 708; *Capehart v. Etheridge*, 63 N. Car. 358.

ered.²²⁰ Nor will proceedings on a judgment at law be enjoined in equity in order to give the defendant an opportunity to set off or recoup a counterclaim, where such claim is unliquidated and arose out of an entirely distinct transaction.²²¹ An injunction granted to restrain the collection of a judgment on the ground that the debtor therein is entitled to a credit for a sum less than the whole amount of the judgment, should provide that the judgment-creditor may proceed by execution to collect the undisputed balance of the judgment.²²²

§ 392. Personal Disability of Parties.

Courts of equity are sometimes called upon to restrain the enforcement of a judgment on the ground that it was taken against a person who, at the time, was incapacitated for legal action by some personal disability, such as infancy, coverture, or lunacy. The degree of validity to be attributed to such judgments is chiefly disputed, as we have already seen, in cases where a judgment by default has been rendered upon a cause of action to which the infancy or coverture, if pleaded, would have been a complete defense.²²³ If, on the one hand, such disability of the defendant is not regarded as a jurisdictional defect, a judgment of this character will at most be voidable and not void. This is the position taken by many of the courts, as will appear from the sections just cited. But in such case, the remedy is obviously by motion or other appropriate proceeding in the court rendering the judgment. And any application to equity for relief would be met by the familiar rule that an injunction cannot be granted on account of matters which might and should have been pleaded in defense to the action at law. But if, on the other hand, as many decisions hold, such a status as coverture amounts to a negation of that juristic personality which is essential to the formation of any and all legal relations, then it is equally evident that the courts of law can acquire no jurisdiction over a defendant so circumstanced, and that a judgment

²²⁰ *Wolcott v. Jones*, 4 Allen, 367; *Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 224.

²²¹ *Jackson v. Bell*, 31 N. J. Eq. 554.

²²² *Levy v. Steinbach*, 43 Md. 212.

²²³ See, as to married women, §§ 188-191; as to infants, §§ 193-197; and as to lunatics, § 205.

such as that supposed would be simply null. That equity would have power to restrain its collection seems clear beyond doubt. And it will become still more clear if we reflect that, since, on the premises, the defendant would have no power to employ an attorney or interpose a defense, the case is brought well within the confines of the rule which has formed the connecting thread of this whole chapter, viz: that chancery will relieve against an inequitable judgment on grounds which could not have been pleaded at law.²⁴³ The reader will be further advised of the doctrines on this topic by referring to the discussion of the general subject in a previous chapter. It is held that service of process on a privileged person (as a member of the legislative body) is not void, and his remedy is by motion or plea, and not by injunction to restrain an execution on a judgment by default against him on such service.²⁴⁴

PART III. PRACTICE ON APPLICATION TO ENJOIN JUDGMENT.

§ 393. Nature and Requisites of Bill.

A bill in equity for an injunction against a judgment at law should always show that the merits of the controversy are with the complainant. If it alleges no defense to the claim on which the judgment was rendered it states no cause of action and will be dismissed.²⁴⁵ So the bill should not only show a good reason why the evidence was not saved by a bill of exceptions (if such was the case), but should also show what the evidence was which authorized the judgment complained of, and the grounds of the party's defense, the reason, if any, why it was not made, and such other facts as would make a case, or there will be no error in the dismissal of the bill.²⁴⁶ And a bill seeking to enjoin a judgment and execution, which does not so identify them as to make it appear what judgment and exe-

²⁴³ Griffith v. Clarke, 18 Md. 457; Me-
dard v. Fasnacht, 15 La. Ann. 631.

²⁴⁴ Peters v. League, 18 Md. 58, 71 Am.
Dec. 622.

²⁴⁵ Rotan's Heirs v. Springer (Ark.), 12
S. W. Rep. 156.

²⁴⁶ Buntain v. Blackburn, 27 Ill. 406.

cution are meant, and which does not limit the prayer for injunction to any particular judgment and execution, is demurrable.³⁴⁷

§ 394. Conditions on Granting Relief.

In accordance with the general rule and policy of equity, it is held that he who seeks relief against a judgment must *do equity*; that is, he must restore any advantage he may have gained, and he must submit to all orders of the court necessary to adjust the rights of the litigants in entire accordance with equity.³⁴⁸ Thus, if the whole amount involved is not disputed, the complainant must pay or offer to pay what he admits to be due, or show some sufficient excuse for his failure; otherwise his case cannot be sustained.³⁴⁹ An order for an injunction to a sale under execution does not become effectual until any conditions required by the order (such as the execution of a bond) have been complied with.³⁵⁰ Equity will of course be guided, in the matter of imposing conditions, by the peculiar circumstances of the individual case.

§ 395. Effect of Enjoining Judgment.

An injunction to prevent a judgment-plaintiff from proceeding further with his execution does not generally operate as a release of errors.³⁵¹ And so the injunction, if not perpetual, does not destroy the lien of the judgment, but merely suspends it until the dissolution of the injunction.³⁵² Hence, "when the operative energy of an execution has been suspended by an injunction, a sale under a junior execution does not affect the lien acquired by such elder execution, but the property in the hands of any person remains liable to a levy

³⁴⁷ *Adams v. White* (Fla.), 2 South. Rep. 774.

³⁴⁸ *Creed v. Scruggs*, 1 Heisk. 590; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Baragree v. Cronkhite*, 83 Ind. 192; *Yonge v. Shepperd*, 44 Ala. 815; *Overton v. Stevens*, 8 Mo. 622; *Flickinger v.*

Hull, 5 Gill, 60; *Shelton v. Gill*, 11 Ohio, 417; *Hill v. Harris*, 42 Ga. 412.

³⁴⁹ *Yonge v. Shepperd*, 44 Ala. 815.

³⁵⁰ *Pell v. Lander*, 8 B. Mon. 554.

³⁵¹ *St. Louis, A. & T. H. R. Co. v. Todd*, 40 Ill. 89.

³⁵² *Smith v. Everby*, 4 How. (Miss.) 178.

when the injunction is removed."²⁵³ But where the collection of an execution is enjoined, and the officer has other junior executions in his hands, and proceeds to sell the property levied upon, he cannot apply the proceeds to the execution enjoined, although before the return of the process the injunction, by consent, is dissolved by order of court.²⁵⁴ A judgment suspended by injunction may be revived on the death of either party, and the injunction operates on the judgment on *scire facias*, prohibiting execution thereon.²⁵⁵ Where the execution of a judgment is restrained by injunction until the lien is lost by limitation, the party proceeding by injunction, upon its dissolution, cannot take advantage of such loss of the lien.²⁵⁶ Where a judgment upon a bill of exchange against an acceptor was enjoined, it was held not to enjoin suits against the other parties to the bill.²⁵⁷

§ 396. Dissolution of Injunction.

Where the injunction of an entire judgment at law has in the first instance been properly granted, and the answer shows that the complainant is entitled to some relief, though not to the extent claimed in the bill, the injunction may be dissolved in part, or continued on such terms as will insure ultimate justice between the parties; but to authorize such dissolution, or a requirement that the complainant pay a portion of the judgment into court, as a condition to the continuance, the answer should show explicitly the amount which the plaintiff at law is in equity entitled to receive. If this be not done, and there is no danger of the debt being lost by continuing the injunction, it should be retained until the final hearing.²⁵⁸ On dissolving an injunction shown to be groundless, damages may be given against the complainant according to the amount of the judgment enjoined.²⁵⁹

²⁵³ *Lynn v. Gridley, Walker (Miss.)*, 548, 12 Am. Dec. 591.

²⁵⁴ *Newlin v. Murray*, 68 N. Car. 566.

²⁵⁵ *Richardson v. Prince George*, 11 Gratt. 190.

²⁵⁶ *Work v. Harper*, 31 Miss. 107, 68 Am. Dec. 549.

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²⁵⁷ *Bohannon v. Combs*, 12 B. Mon. 568.

²⁵⁸ *Maulden v. Armistead*, 18 Ala. 500.

²⁵⁹ *Stewart v. Robinson*, 24 La. Ann. 183.

CHAPTER XVI.

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PART I. ORIGIN AND NATURE OF JUDGMENT-LIENS.**§ 397. Early History of Judgment-Liens.**

At common law, except for debts due the king, the lands of a debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. "This was in accordance with the policy of the feudal law, introduced into England after the Conquest, which did not permit the feudatory to charge, or to be deprived of, his lands for his debts, lest thereby he should be disabled from performing his stipulated military service, and which, moreover, forbid the alienation of a feud without the lord's consent. The goods and chattels of the debtor, therefore, and the annual profits of his lands, as they arose, were the only funds allotted for the payment of his debts. This continued to be the law until the passage of the statute of Westminster 2d, 13 Edward I, c. 18, by which, in the interest of trade and commerce, the writ of *elegit* was for the first time provided for. By that statute the judgment-creditor was given his election to sue out a writ of *fi. fa.* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plough) and a *moiety* of his lands until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an *elegit*, and the interest which the creditor acquired in the lands by virtue

of the judgment and writ was known as an estate by *elegit*.¹ It will be at once apparent that the right thus conferred upon the creditor gave rise to a true judgment *lien*, although it differed materially, both in its extent and the manner of its enforcement, from the type with which we are now familiar.

§ 398. Judgment-Lien is Statutory.

If we inquire, therefore, in any case, for the ultimate basis of the lien of a judgment on land, it must be supported by statutory authority. In most, if not all, of the American states, the legislatures have enacted in express and positive terms that judgments shall be liens on land for a prescribed number of years. But in some, this direct creation of a most effective remedy did not come until comparatively late in their history. In the interval, it is true, real estate was considered bound by a judgment against its owner, but that was only in virtue of the early English statute above referred to, which had been adopted by the state or not repudiated. Thus the statute of Westminster 2d "was substantially adopted in Virginia at an early day, and in consequence of this right to subject a moiety of the defendant's lands, the courts held that a lien was acquired by the judgment, which extended to all the defendant's lands within the state, and which was superior to the claims of subsequent purchasers, though for valuable consideration and without notice. The lien thus acquired was a legal lien, and remained so long as the capacity to sue out an *elegit* continued, whether the writ was sued out or not."² But, compared with the species of judgment lien now commonly known, it could only be regarded as a qualified or restricted lien. For, from the nature of the writ which occasioned it and by which it was to be enforced, it could not be foreclosed by a *sale* of the realty, but only by taking it into possession and receiving the rents and profits. In the absence, then, of express legislative enactment, judgments do

¹Hutcheson v. Grubbs, 80 Va. 254; Borst v. Nalle, 28 Gratt. 423; Price v. Jones v. Jones, 1 Bland Ch. 443, 18 Am. Dec. 327; 2 Co. Inst. 394; 8 Bl. Comm. 418; Bac. Abr. *Execution*, D.

²Hutcheson v. Grubbs, 80 Va. 254; 3 Bland's Ch. 284, 22 Am. Dec. 236.

not attach as liens to real estate in the modern sense of the term.³ "Unless there is a statute in the particular state expressly making a judgment a lien on real estate, no such property will attach to it; and the only kind of lien belonging to it will be that arising in consequence of the right to take out an *eligit*." ⁴ An illustration of this may be found in a decision of the supreme court of Pennsylvania that, in divorce proceedings, an order for the payment of the wife's expenses and support *pendente lite* is not a judgment such as to create a lien on the husband's lands; the ruling being based on the ground that there is no statutory authority for so regarding it.⁵

§ 399. Legislative Control of Judgment-Liens.

Since liens arising from judgments are exclusively the creatures of statute, we should naturally expect to find them largely under the control of the legislature, except in so far as the necessity of preserving vested rights and contractual obligations should forbid such interference. And so the decisions have always held. Thus a law requiring a judgment to be docketed in each county where it is sought to bind real estate of the defendant, although previously it was a lien throughout the state without this, is constitutional and valid.⁶ So a statute changing the mode of acquiring a lien under an existing judgment upon the property of the debtor (for example, by substituting the lien of a docketed judgment for that formerly created by a *fieri facias*) is not objectionable on constitutional grounds.⁷ So again, it has been held that a statute which provides that "no judgment *heretofore* rendered or which may hereafter be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after the rendition of such judgment, shall operate as a lien upon the estate of any judgment-debtor to the prejudice of any *bona fide* judgment-creditor," affects the remedy merely, and, in its operation upon judgments rendered before its passage, it is not

³ Walker v. Elledge, 65 Ala. 51; Carlisle v. Godwin, 68 Ala. 187; Mitchell v. Wood, 47 Miss. 281.

⁴ United States v. Morrison, 4 Pet. 124.

⁵ Groves's Appeal, 68 Pa. St. 148.

⁶ Tarpley v. Hamer, 9 Sm. & Mar. 310.

⁷ Whitehead v. Latham, 88 N. Car. 282.

to be considered *ex post facto*, nor does it impair the obligation of contracts.⁸ However it may be in regard to judgments entered before the passage of the act, it is certain that a statute denying to final judgments *thereafter* rendered the incident of a lien on real property does not impair the obligation of contracts made before its enact-

⁸ *McCormick v. Alexander*, 2 Ohio, 65, 75; *Bank of U. S. v. Longworth*, 1 McLean, 85; *Ray v. Thompson*, 48 Ala. 484, 94 Am. Dec. 696. In *McCormick v. Alexander*, *supra*, the conclusion is thus reasoned out: "In order to dispose correctly of this objection, it is only necessary to ascertain the nature of the right vested in Evans [the judgment creditor]. It was not a right acquired by contract or agreement; it was not one which vested in him in consequence of the recovery of judgment alone, for, as has been before observed, it is not the necessary consequence of a judgment that it shall operate as a *lien* upon either real or personal estate. Whether it shall so operate, and how far, depends upon legislative enactment. Had this right vested in Evans by contract, he could not have been deprived of it but by his own act. The legislature are restrained from passing any law which shall impair or even change the nature of a contract. Neither can a law regulating judgments and executions be considered as a law which enters into the nature of contracts, or which the parties have in view when they contract. Judgments are recovered as well for injuries sustained by torts, as for those which are sustained by reason of breach of contract. Judgments, too, are recovered not only for breach of contracts entered into in our own state, but for the breach of those which are made in other states and countries. When these judgments are once rendered, they operate equally as *liens*, without reference to the consideration for which they are rendered. The law of the place where a contract is made,

or is to be executed, may be said, in a certain degree, to constitute a part of the contract. It is always to be taken into consideration in construing, but never in enforcing, the contract. A contract made in Virginia, and to be executed in that state, must be construed according to the laws of Virginia; but if that contract is enforced in Ohio, it must be done according to the laws of Ohio. This right, then, was not vested in him by contract, neither was it vested in him by the operation of a law which could, with propriety, be said to constitute a part of the contract, if, perchance, his judgment was founded upon a contract. Neither was this right founded in any principle of natural justice; because if it were founded in natural justice, we might suppose all the laws on this subject would be similar in all countries, whereas we find them variant. Further, if natural justice had anything to do with the case, it would seem to dictate that the debt first contracted should be first paid, whereas we well know that the priority of the judgments does not at all depend upon the priority of the demands upon which they are founded. If any creditor suffers, it is generally the one who is most indulgent. Inasmuch, then, as this right was vested in Evans, not by any contract of his own—not by any principle of natural justice—but by the mere operation of a law which cannot, with propriety, be said to enter into the nature of, or constitute a part of, the contract, I see no reason for saying that the legislature had not power to repeal this law, thereby depriving him of his right."

ment.⁹ And conversely, what the legislature can take away, it can confer by a retrospective law. Thus a statute of Texas which provided that "whenever final judgments *shall be* rendered in any court of record of this state, said judgments shall become a lien," etc., was held to be retroactive, the words italicized being construed as equivalent to "shall have been," and so giving a lien to judgments rendered before its passage.¹⁰

§ 400. Lien gives no Property in Debtor's Land.

"If anything is settled by reason and authority, it is that a judgment-creditor is not entitled to the protection of a purchaser of the legal title against an equitable owner or his creditors, or to any advantage which his debtor had not."¹¹ A judgment-lien, binding the present and future real property of the debtor, is a creation of statute laws and has no other existence; a general lien by judgment does not constitute *per se* a property in the land itself, but only gives a right to levy on the same to the exclusion of adverse interests subsequent to the judgment.¹² Hence a judgment creditor has neither *jus in re* nor *jus ad rem* in the debtor's land, but only the right to make his lien effectual by a sale under execution.¹³ So if A. makes a verbal contract with B. to sell him a tract of land and puts him in possession, judgment-creditors of B. do not thereby, by virtue of the lien of their judgments or the levy of execution, acquire such an interest in the land as to entitle them to be subrogated to the rights of B., and to compel A. to make a conveyance to them upon paying him the purchase-price which B. was to pay.¹⁴ But on the other hand, a judgment-creditor has the right to proceed by ancillary pro-

⁹ Moore v. Holland, 16 S. Car. 15.

¹⁰ Moore v. Letchford, 35 Tex. 185, 14 Am. Rep. 368.

¹¹ Reed's Appeal, 18 Pa. St. 476.

¹² Finch v. Winchelsea, 1 P. Wms. 377; Brace v. Duchess of Marlborough, 2 P. Wms. 49; Conard v. Ins. Co., 1 Pet. 443; Pierce v. Brown, 7 Wall. 205; Cover v. Black, 1 Pa. St. 498; Reed's Appeal, 18 Pa. St. 475; Sill v. Swack-

hammer, 103 Pa. St. 7; Kollock v. Jackson, 5 Ga. 153; Foute v. Fairman, 48 Miss. 586; Young v. Templeton, 4 La. Ann. 254, 50 Am. Dec. 568; Swarts v. Stees, 2 Kans. 236, 85 Am. Dec. 588; Ashton v. Slater, 19 Minn. 847, (Gil. 800.)

¹³ Dail v. Freeman, 93 N. Car. 351.

¹⁴ Logan v. Hale, 43 Cal. 645.

ceedings, in any other court of concurrent jurisdiction with the court rendering the judgment, to remove clouds from titles to any property which he deems to be subject to the lien of his judgment.¹⁵ A judgment for a sum of money, which may be satisfied by a sale of real estate if not otherwise satisfied, is not *lis pendens* in regard to the title to the real estate of the defendant in the judgment; either it is a lien or the real estate is not affected by it.¹⁶ Since a judgment-lien constitutes no property in the land itself, the judgment-debtor has a right, previous to levy, to cut timber and firewood, which, if not removed, are his personal property and do not pass by execution-sale.¹⁷ An assignee in bankruptcy takes the property subject to all existing liens, and cannot avail himself of a claim that an execution was dormant at the time of the assignment, if the bankrupt could not.¹⁸

§ 401. Lien is General.

"A judgment is not a specific lien upon any specific real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment-creditor as to the existence of such liens."¹⁹ In the case, however, where mortgaged premises have been sold at a sheriff's sale under a judgment junior to the mortgage, and where the time for redemption has not expired, the general lien of the judgment is turned into a specific lien upon the premises, to the extent of the amount of the bid at the sheriff's sale and of the interest thereon.²⁰ It should also be noted, that the lien being but an incident of the judgment, its loss does not necessarily impair the validity of the judgment as a personal security. Thus a judgment obtained against a decedent in his lifetime, the lien of which has expired by failure to revive, is sufficient evidence of a claim in the distribution of a fund which belongs to his estate.²¹

¹⁵ *Scottish-American Mortgage Co. v. Follansbee*, 14 Fed. Rep. 125.

¹⁶ *St. Joseph Manuf. Co. v. Daggett*, 84 Ill. 556.

¹⁷ *School District v. Werner*, 43 Iowa, 643.

¹⁸ *Crane v. Penny*, 2 Fed. Rep. 187.

¹⁹ *Rodgers v. Bonner*, 45 N. Y. 379; *Lanning v. Carpenter*, 48 N. Y. 408; *Dozier v. Lewis*, 27 Miss. 679; *Manassfield v. Gregory*, 11 Nebr. 297, 9 N. W. Rep. 87.

²⁰ *Snyder v. Stafford*, 11 Paige, 71.

²¹ *Esterly's Appeal*, 109 Pa. St. 222.

§ 402. Courts cannot control the Lien.

As a general rule, and except in special and peculiar cases, it does not belong to the courts of law to prescribe the kind or extent of the lien which shall result from the judgments they pronounce, or to control it in any way, as by restricting it to certain described property.²² The court has usually nothing to do with the manner in which its judgment shall be enforced or the fund from which it shall be satisfied; it merely pronounces the sentence of the law upon the facts before it, to which, thereupon, the incident of a lien attaches by virtue solely of positive law. It is of course to be understood that reference is here made to judgments at law, as distinguished from decrees in chancery. The powers of equity in this respect are sufficiently familiar.

§ 403. Parties cannot change Nature of Lien.

"The lien of a judgment upon the lands of the judgment-debtor is entirely the creature of the statute, and is not dependent in any manner upon the contract of the parties. It begins, continues, and terminates at the will of the legislature."²³ Hence parties cannot by agreement convert a judgment into a chattel mortgage or a bill of sale, or give to it any greater effect than the law gives it; and a parol agreement that a judgment shall be a lien upon all the debtor's personal property will not be enforced in equity, even as against subsequent assignees who assent to the arrangement.²⁴

§ 404. Docketing the Judgment.

It is a general statutory requisite that judgments shall be duly entered upon the docket before they can become liens upon the debtor's realty, at least as against subsequent purchasers in good faith.²⁵ And it is the duty of a plaintiff to see that his judgment is

²² *Castro v. Illies*, 13 Tex. 229; *Hadwin v. Fisk*, 1 La. Ann. 43.

²³ *Houston v. Houston*, 67 Ind. 276.

²⁴ *Lanning v. Carpenter*, 48 N. Y. 408.

²⁵ But it is held that a judgment, though undocketed, is good against

rightly and properly entered; for if the officer, in entering it, omits the initial letter of the defendant's name, which distinguishes him from others of the same name, whereby a purchaser of the defendant's real estate was deceived, although the judgment would be binding as between the original parties to it, there could be no recovery from the purchaser as *terre-tenant*.²⁵ Where a judgment, through inadvertence of the clerk of the court, was docketed in the wrong book, so that it appeared earlier than its proper place, in the chronologic order of judgments docketed, but still it appeared among those docketed within the ten years allowed for judgments to be a lien, it was held that one who took a mortgage upon land of the debtor, within ten years from the docket entry, was chargeable with constructive notice of the judgment, and held subject to its lien, although he failed, through the irregularity in the record, to gain actual notice of it.²⁷

§ 405. Indexing the Judgment.

In many of the states there is a further statutory requirement, designed for convenience and expedition in making searches, that the judgment be duly *indexed*. This is usually done in a separate book or series of books kept for that purpose, and under the judgment-debtor's surname in its alphabetical order. The statute may be so framed as to make the index an essential part of the record; and when this is the case, a judgment is no lien upon the debtor's property, until correctly indexed, as against a purchaser who has searched the index with due care.²⁸ And the judgment, though duly filed and recorded, creates no lien if it is not indexed.²⁹ In Virginia it has been decided that indexing the judgment is no part of the record; and a judgment-creditor who procures his judgment to be properly docketed secures a valid lien, even though it is not prop-

subsequent *creditors* with or without notice. *Gordon v. Rixey*, 76 Va. 694. Under the Texas statute which requires judgments to be recorded in order to create liens, an unrecorded writ of error bond, given upon an unrecorded judgment, creates no lien. *Hart v. Russell*, 82 Tex. 81.

²⁵ *Wood v. Reynolds*, 7 Watts & S. 406.

²⁷ *Hesse v. Mann*, 40 Wis. 560.

²⁸ *Metz v. State Bank*, 7 Nebr. 165; *Sterling Manuf. Co. v. Early*, 69 Iowa, 94, 28 N. W. Rep. 458.

²⁹ *Nye v. Moody*, 70 Tex. 424, 8 S. W. Rep. 606.

erly indexed, as against a purchaser who has been led to buy by the omission in the index.³⁰

§ 406. Certainty required in Docket and Index.

The common occurrence of mistakes in the docketing and indexing of judgments, such as mis-spelling of names and other irregularities, has frequently led the courts to pass upon the degree of certainty required in these entries. The purport of the decisions appears to be that the sufficient degree of accuracy is attained if an intending purchaser (for example), exercising a reasonable degree of care and a reasonable amount of intelligence in making a search, could not fail to be apprised of the existence and character of the judgment. At the same time, "a subsequent purchaser is affected with such notice as the index entries afford; and if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril."³¹ A description of a person by the name by which he is commonly known is sufficient for the purposes of a docket entry.³² That the name is mis-spelled is not always a fatal error. If it is spelled phonetically,—that is, if the name as written on the index would be pronounced in the same manner as the person's true name is commonly and habitually pronounced,—it is sufficient to give notice, provided that the variation in spelling is not so radical that no one would be likely to think of the names as identical.³³ But there must be such a degree of approximation as to be readily understood. For instance, a judgment rendered against "Bankhead," and recorded and indexed as against "Burkhead," confers no lien.³⁴ So it has been held that "Helen" and "Ellen" cannot be regarded as the same name; and a judgment entered and indexed against "Ellen Desney" is not constructive notice that it is a lien upon lands of "Helen Desney."³⁵ Again, the statute requiring record notice of judgment-liens intends

³⁰ *Old Dominion Granite Co. v. Clarke*, 28 Gratt. 617.

³¹ *Metz v. State Bank*, 7 Nebr. 165.

³² *Jones's Estate*, 27 Pa. St. 336.

³³ *Myer v. Fegaly*, 39 Pa. St. 429.

³⁴ *Anthony v. Taylor*, 68 Tex. 408, 4 S. W. Rep. 581.

³⁵ *Thomas v. Desney*, 57 Iowa, 58, 10 N. W. Rep. 815.

that the docket shall exhibit the names spelled in English. It is to furnish a guide to the eye, not the ear. Hence, "Joest" will not serve for "Yoest."³⁶ The omission of the initial letter of the defendant's middle name does not render the entry invalid or prevent the judgment from becoming a lien as against subsequent purchasers. "It was enough that one christian name was properly added to the surname of the defendant, for in legal proceedings the law recognizes but one christian name, and where a party is sued by that alone, the proceedings taken may regularly be continued to judgment in that name, and the fact that he may have one or more other names between his first christian name and his surname will in no way affect their validity. This is an old and well established rule of the common law, that has in no manner been changed, either by legislation or the ruling of the courts in this state."³⁷ The term "Junior" is a convenient means of distinguishing between father and son who bear the same name, but, on common law principles, it is no part of the younger man's name, and hence is not required to be included in the docket-entry of a judgment against him, although the "Senior" of the same name resides in the same county.³⁸ A judgment against a firm, docketed without setting out the christian names of the individual partners, is held in Pennsylvania to be of no effect as a lien, so far as regards subsequent purchasers and incumbrancers in good faith.³⁹ But an opposite view obtains in California.⁴⁰ It must further be observed that a judgment duly rendered against one whose name is mis-spelled or otherwise incorrectly given in the proceedings, will be a lien on his real estate, when docketed, against all but those who can claim that by reason of the error the docket was no notice to them. A fraudulent grantee cannot object to it.⁴¹

³⁶ *Hell's Appeal*, 40 Pa. St. 453, 80 Am. Dec. 590.

³⁷ *Clute v. Emmerich*, 26 Hun, 10.

³⁸ *Bidwell v. Coleman*, 11 Minn. 78, (Gil. 45.)

³⁹ *York Bank's Appeal*, 36 Pa. St. 453; *Ridgway's Appeal*, 15 Pa. St. 177,

53 Am. Dec. 536; *Smith's Appeal*, 47 Pa. St. 128; *Hamilton's Appeal*, 103 Pa. St. 363.

⁴⁰ *Hibberd v. Smith*, 50 Cal. 511.

⁴¹ *Fuller v. Nelson*, 35 Minn. 213, 23 N. W. Rep. 511.

PART II. WHAT JUDGMENTS CREATE LIENS.

§ 407. What is necessary to Judgment-Liens.

In order that a judgment should create a lien upon the real property of the debtor, it is first of all necessary that it should be capable of collection by execution against such property. A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon.⁴³ So a judgment against a municipal corporation is not a lien on its real estate, because no execution can issue against the land.⁴⁴ Next, it is essential that the judgment should have been rendered by a lawful and validly constituted court. Upon this point questions have seldom arisen, except in connection with the acts of courts created by the insurrectionary authorities in the southern states during the late civil war. Thus it was held in Alabama that judgments rendered by the courts of that state, during the period referred to, did not create such a lien upon the property of the judgment debtor as, in the absence of legislation, could be recognized and enforced by the courts of the now existing state government.⁴⁵ Later decisions, it is true, have recognized a higher degree of validity in such judgments;⁴⁶ but it is only by acknowledging the rightful existence of those courts, so that the change of opinion does not militate against the rule here contended for.

In the next place, in order that there should be a lien, it is necessary that there be a valid and subsisting judgment. If the alleged judgment is absolutely void and a mere nullity, it can of course create no lien. Or, to speak more exactly, it creates that which may bear the semblance and color of a lien, but which is incapable of originating or transferring rights, since the judgment itself, to which the lien is only an incident, will not bear the test of judicial

⁴³ *In re Boyd*, 4 Sawy. 262.

⁴⁴ *Schaffer v. Cadwallader*, 86 Pa. St. 126.

⁴⁵ *Martin v. Hewitt*, 44 Ala. 418; *Noble v. Cullom*, 44 Ala. 554; *Barclay v. Plant*, 50 Ala. 509. The incident of

lien was accorded to such judgments by Rev. Code Ala. § 2877, Act Feb. 19, 1867.

⁴⁶ *Parks v. Coffey*, 52 Ala. 42; *Hill v. Huckabee*, 52 Ala. 155; *Hill v. Armistead*, 56 Ala. 118. See *supra*, § 173.

scrutiny. Similarly, where a verdict and judgment are set aside and a new trial granted, such judgment does not operate as a lien upon the defendant's property.⁴⁶ And so a judgment which has been reversed upon appeal, is not a lien, pending its further appeal, upon the defendant's estate, and it will not be allowed to prejudice the title of a *bona fide* purchaser for value.⁴⁷ It was even held, in an early Massachusetts case, that a deed of land was a good and lawful conveyance, although an execution had been levied upon the land, when the judgment under which the execution issued, though not yet reversed, was so erroneous that it was "legally certain" that it would be reversed.⁴⁸

In the next place, it is requisite that the judgment should be for a definite and certain sum of money.⁴⁹ A judgment which specifies no sum recovered, but refers to the pleadings to show what is adjudged, cannot create a lien on lands of the defendant as against a party lending on the property without other notice than that afforded by the registry of the judgment.⁵⁰ But a judgment in an action for an accounting between partners, requiring the payment of a specified sum of money by one of the parties to a receiver, may be docketed in favor of the receiver and be enforced by execution.⁵¹ And a final judgment of a court of record is a lien, although for costs only.⁵²

In the next place, it is important to pay some attention to the kind or character of the judgment, with reference to its capacity for creating a lien. A judgment by confession carries with it a lien on lands,⁵³ and so of course does a judgment by default, if it is final and definite. In Pennsylvania, under the statutes on the subject, an award has no greater effect than the verdict of a jury until approved by the court and judgment entered on it, and consequently, until that is done, it does not constitute a lien on realty.⁵⁴ In another state, a forfeited

⁴⁶ Paxton v. Boyce, 1 Tex. 317.

⁴⁷ Foot v. Dillaye, 65 Barb. 521; Meyer v. Campbell, 12 Mo. 608.

⁴⁸ Borden v. Borden, 5 Mass. 67, 4 Am. Dec. 32.

⁴⁹ Hamburger v. Easter, 57 Ga. 71; Lirette v. Carrane, 27 La. Ann. 298;

Eames v. Germania Turn Verein, 74 Ill. 54.

⁵⁰ Lirette v. Carrane, 27 La. Ann. 298.

⁵¹ Geery v. Geery, 68 N. Y. 252.

⁵² Bobb v. Graham, 15 Mo. App. 299.

⁵³ Gilman v. Hovey, 26 Mo. 280.

⁵⁴ Stephen's Appeal, 38 Pa. St. 9. An

forthcoming bond has the force of a judgment, so as to create a lien upon the lands of the obligors, but only from the time the bond was returned to the clerk's office.⁵⁵ A recognizance to the commonwealth, or a judgment thereon in favor of the commonwealth, creates no lien upon the estate of the party, unless by express statute.⁵⁶ So a rule absolute against a sheriff requiring him to pay over money is not such a judgment as binds his property in the same way in which judgments on verdicts bind it.⁵⁷ The mere loaning of money to a judgment debtor, to be applied by him in part satisfaction of a judgment which is a lien upon the debtor's land, does not operate to transfer such lien, in whole or in part, to the lender, even though it was understood between the parties to the transaction that it should have that effect.⁵⁸

§ 408. Interlocutory Judgments.

It is generally held that an interlocutory judgment by default, which lacks finality until the amount of the recovery is ascertained, cannot be considered as creating a lien. The incident of lien does not attach until the sum to be recovered is made definite and finally entered up, and then it does not relate back to the entry of the interlocutory judgment.⁵⁹ But the supreme court of Pennsylvania has ruled that a judgment entered by default for want of a plea is not interlocutory but final, and constitutes a lien upon the defendant's real estate from the date of entry, although the damages may not have been assessed, if the claim is for a sum certain or is ascertainable by calculation.⁶⁰ But a judgment by confession for a sum to be ascertained by the prothonotary binds the real estate of the defendant only from the time of the liquidation of the sum by the prothonotary.⁶¹

award of arbitrators in favor of a plaintiff, from which he appeals, is not a lien upon the defendant's real estate so long as the appeal stands. *Eaton's Appeal*, 88 Pa. St. 152.

⁵⁵ *Cabell v. Given*, 80 W. Va. 760, 5 S. E. Rep. 442.

⁵⁶ *Commonwealth v. Adkins*, 8 B. Mon. 380.

⁵⁷ *Speer v. McPherson*, 24 Ga. 146.

⁵⁸ *Unger v. Leiter*, 82 Ohio St. 210.

⁵⁹ *De Saussure v. Zeigler*, 6 Rich. 12; *Davidson v. Myers*, 24 Md. 538.

⁶⁰ *Sellers v. Burke*, 47 Pa. St. 344; *Hays v. Tryon*, 2 Miles (Pa.), 208; *Bryan v. Eaton*, 4 Week. Notes Cas. 493.

⁶¹ *Philadelphia Bank v. Craft*, 16 Serg. & R. 347.

§ 409. Judgments against Personal Representatives.

Inasmuch as executors and administrators are not invested with the title to the lands of the decedent, it follows that judgments rendered against them in their representative character have no operation as liens upon realty belonging to the estate.⁶³ And in Connecticut, under a statute which provides that if the owner of an unsatisfied judgment shall file a certificate in the town clerk's office, it shall constitute a lien upon land belonging to the debtor, which may be foreclosed or redeemed in the same manner as a mortgage, if an execution could have been levied thereon, it is held that a judgment creditor who has obtained a judgment against the administrator of his debtor's estate cannot thus obtain a lien against the land of the estate.⁶⁴

§ 410. Nunc Pro Tunc Judgments.

A purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time of the purchase, and it is not competent for a court to bind by a lien the land of a third person by the rendition of a *nunc pro tunc* judgment against his grantor.⁶⁵ In a case in Indiana, two judgments having been rendered by a justice of the peace, the plaintiff took transcripts and filed them in the clerk's office of the proper county; afterwards the judgment debtor sold a tract of land situated in that county and received the purchase-money in full; a few days later the transcripts, together with the order-book in which they were recorded, were destroyed by fire; afterwards the justice made out new transcripts, and these were duly filed. It was held that the judgments, as evidenced by the second transcripts, were not liens on the land.⁶⁶ An amendment of a judgment which was originally incomplete cannot relate back so as to impair the title of one who purchased the judgment-

⁶³ *Laidley v. Kline*, 8 W. Va. 218;
Woodyard v. Polsley, 14 W. Va. 211.
⁶⁴ *Flynn v. Morgan*, 55 Conn. 180, 10
Atl. Rep. 466.

⁶⁵ *Miller v. Wolf*, 68 Iowa, 283, 18 N.
W. Rep. 889.

⁶⁶ *Sheldon v. Arnold*, 17 Ind. 165.

debtor's land, prior to the order of amendment, in good faith and for a valuable consideration.⁶⁶

§ 411. Decrees in Chancery.

It is generally held, under statutes assimilating judgments and decrees in respect to their effects and means of enforcement, that a decree in chancery, if for a liquidated sum of money, creates a lien upon the debtor's land.⁶⁷ The proviso here inserted obviously restricts the class of decrees attended with this incident within narrow limits. Thus it is said: "A decree of foreclosure is not such a decree as will confer a general lien as a judgment at law. True, the statute provides that decrees of courts of chancery 'shall, from the time of their being pronounced, have the force and effect of a judgment at law.' A judgment at law gives a general lien, but it is not every decree in chancery that can give a lien similar to a judgment. There are a great variety of decrees in chancery which give no lien, such as decrees or injunctions to stay waste, to surrender and cancel securities, to set aside fraudulent conveyances, and various others; yet the language of the statute covers all decrees. Hence the language of the statute must be limited, and as a lien is only a security for a money demand, no decree in chancery can confer a lien under the statute except a decree expressly for the payment of money. At law it is only a judgment against a debtor or a judgment for the payment of money that gives a lien; a judgment in ejectment gives no lien. Hence the decrees in chancery that confer liens similar to judgments are decrees for the payment of money. A decree of foreclosure is not a decree for the payment of money."⁶⁸ A decree providing that if the defendant does not, in a given time, pay the plaintiff a certain sum, certain property of the defendant, real and personal, on which the plaintiff has a specific lien, shall be sold, is not a decree which creates a lien on other real estate of the defendant.⁶⁹

⁶⁶ *Lea v. Yeates*, 40 Ga. 56.

⁶⁷ *Scriba v. Deanes*, 1 Brock. 166;
Eames v. Germania Turn Verein, 74
Ill. 54; *Blake v. Heyward*, 1 Bailey Ch.
208; *Close v. Close*, 28 N. J. Eq. 472.

⁶⁸ *Myers v. Hewitt*, 16 Ohio, 449, 454,
per Read, J. And see *Hamburger v.*
Easter, 57 Ga. 71.

⁶⁹ *Linn v. Patton*, 10 Wa. Va. 187.

In an action to enforce a mortgage, if a judgment is entered directing a sale of the mortgaged property and an application of the proceeds on the amount due, and further declaring that, in case of a deficiency, the plaintiff have execution for the balance, the lien of the judgment does not attach to real estate of the defendant other than that mortgaged, until after a sale has been made and a deficiency reported, even if the judgment is docketed when first rendered.⁷⁰ "A mere contingent provision, referring to no particular amount, and in abeyance until the contingency is determined, is not within the meaning of the statute. It may become a valid and perfect judgment, but until the amount to be recovered is ascertained and fixed, no effect can be given to it as a lien."⁷¹ It is also held that a judgment recovered for a debt secured by a mortgage on lands cannot become a lien on such lands; and a sale of the equity of redemption under an execution on such judgment will not confer any title upon the purchaser; and it makes no difference that the judgment was not recovered upon the bond accompanying the mortgage, so long as it was obtained for the same indebtedness.⁷² It should be added that chancery may create a lien directly by decree for that purpose.⁷³

§ 412. Judgments of Inferior Courts.

Judgments rendered by justices of the peace and other inferior courts are not generally recognized by the statutes as creating a lien upon the debtor's realty. But it is commonly provided that such judgments may be transferred, by transcript, to one of the superior courts, and that, the transcripts being duly filed and entered, the judgments shall have the same effect, as liens, as if originally rendered by the court to which they are so transferred. The lien attaches from the time of filing the transcript with the clerk of the superior

⁷⁰ Hibberd v. Smith, 50 Cal. 511; Culver v. Rogers, 28 Cal. 520; Chapin v. Broder, 16 Cal. 408; Winston v. Browning, 61 Ala. 80; Hershey v. Dennis, 53 Cal. 77; Bell v. Gilmore, 25 N. J. Eq. 104. *Per contra*, Fletcher v. Holmes, 25 Ind. 458.

⁷¹ Chapin v. Broder, 16 Cal. 408.

⁷² Greenwich Bank v. Loomis, 2 Sandf. Ch. 70.

⁷³ Carmichael v. Abrahams, 1 Dessau, 114.

court.⁷⁴ And this, although the clerk may neglect to enter such judgment in the docket of the court.⁷⁵ The transcript, to become a lien on real estate, must be filed in the proper court of the county where the judgment was recovered, and cannot in the first instance be filed in the court of another county.⁷⁶ While the allowance of a claim against the estate of a decedent, by a probate court, has all the force and effect of a judgment, it is not generally regarded as creating a lien on the estate.⁷⁷

§ 413. Judgments of Federal Courts.

In states where the judgments of state courts of record create a lien upon the lands of the judgment-debtor, the judgment of a United States circuit or district court, sitting within the state, has the same operation, as a lien, in the county where rendered, and, under certain restrictions to be hereafter noticed, throughout the territory of the state.⁷⁸

§ 414. Statutory Basis of such Liens.

If, as we have already seen, judgment-liens are essentially the creatures of statute law, it is pertinent to inquire how the judgments of the federal courts came to be invested with this operation. Until a recent date there was no legislation of congress specifically declaring that such judgments should have the incident of a lien upon land. Nor could it be within the province of a state legislature to enact that they should have that effect. The answer to the question is given

⁷⁴ *Bunding v. Miller*, 10 Mo. 445.

⁷⁵ *Petray v. Howell*, 20 Ark. 615.

⁷⁶ *Pemberton v. Pollard*, 18 Nebr. 435, 25 N. W. Rep. 582.

⁷⁷ *Kennerley v. Shepley*, 15 Mo. 648, 57 Am. Dec. 219; *Stone v. Wood*, 16 Ill. 177.

⁷⁸ *Massingill v. Downs*, 7 How. 760; *Williams v. Benedict*, 8 How. 107; *Brown v. Pierce*, 7 Wall. 205; *Cropsey v. Crandall*, 2 Blatchf. 841; *Lombard v. Bayard*, 1 Wall. Jr. 196; *Carroll v. Wat-*

kins, 1 Abb. U. S. 474; *Barth v. Makeever*, 4 Bias. 206; *Shrew v. Jones*, 2 McLean, 78; *Sellers v. Corwin*, 5 Ohio, 898, 24 Am. Dec. 901; *Lawrence v. Belger*, 31 Ohio St. 175; *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 271; *Trapnall v. Richardson*, 18 Ark. 548, 58 Am. Dec. 838; *Manhattan Co. v. Everton*, 6 Paige, 457; *Andrews v. Wilkes*, 6 How. (Miss.), 554; *Simpson v. Niles*, 1 Smith (Ind.), 104; *Pollard v. Cocke*, 19 Ala. 188.

in the following language: "Judgments were not liens at common law, but congress, in adopting the modes of process prevailing in the states at the time the judicial system of the United States was organized, made judgments recovered in the federal courts liens in all cases where they were so by the laws of the states, and a later act of congress has provided that judgments shall cease to have that operation in the same manner and at the same periods in the respective federal districts as like processes do when issued from the state courts."⁷⁹ It must not be supposed, however, that this indirect method of vesting such judgments with the quality of lien was in any sense a recognition of a right in the states to regulate the operation of federal judgments. Judgment-liens in the federal courts owe their existence solely to the authority of the national government. As remarked by the supreme court of Ohio: "That judgment-liens are the creations of positive law, without which they cannot exist, and that they cannot survive the law which gives them being, are principles too well settled to be drawn in question. I suppose it equally clear that they must be created by the government under whose authority the judgment is rendered. The state may determine the effect of its own judgments, but cannot affect those rendered by the courts of the United States; while the same limitation is equally true of the legislation of the general government. Each has an equal right to provide for the security and satisfaction of judgments rendered in its courts, but neither has any power whatever to limit this sovereign right in the other."⁸⁰ But since congress originally adopted the state laws on the subject, the rules for determining the nature and character of the judgments that would give a lien, for ascertaining what species of estates were bound thereby, and similar matters, had to be sought in the laws and decisions of the particular state.⁸¹ Thus it is ruled

⁷⁹ *Baker v. Morton*, 12 Wall. 150, Clifford, J. See also *Koning v. Bayard*, 2 Paine, 251. The act of congress above referred to is as follows: "Judgments or decrees, rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees

of the courts of such state cease, by law, to be liens thereon." U. S. Rev. Stats. § 967. This was substantially a re-enactment of the act of July 4, 1840, c. 43, § 4; 5 U. S. Stat. at L. 393.

⁸⁰ *Corwin v. Benham*, 2 Ohio St. 36.

⁸¹ *Perkins v. Brierfield Iron Co.*, 77 Ala. 403.

that a verdict alone, without the entry of a judgment, in a federal court, gives no lien upon land in Pennsylvania.²² So if, under the state law, the lien of a judgment rendered by a court of the state attaches from the day of the final adjournment of the term, the same rule applies to federal judgments in that state.²³ So judgment-liens of the federal courts are subject to the state statute of limitations like the liens of domestic judgments.²⁴ And the lien of such a judgment may be modified or suspended, during the pendency of an appeal or writ of error, in accordance with the state practice, in the discretion of the federal court.²⁵

§ 415. Territorial Extent of such Liens.

In the absence of restrictive legislation by congress, the lien of a federal judgment was always held to be co-extensive with the jurisdiction of the court which rendered it. That is to say, if the judgment was entered by a federal district court, its lien extended to all chargeable property of the debtor throughout the *district*, and was not restricted to the particular county in which the court was sitting, although, by the state law, the lien of a judgment rendered by a state court in that county would not extend into another county; and similarly, if the judgment were rendered by a United States circuit court, its lien would cover all property of the debtor within the confines of the *state*.²⁶ To this effect was a decision of the chief federal court, where it was said: "In those states where the judgment or the execution of the state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create

²² *Estate of Morris*, 6 Phila. 184.

²³ *Jones v. Guthrie*, 28 Ill. 421.

²⁴ *Abbey v. Bank*, 34 Miss. 571, 69 Am. Dec. 401.

²⁵ *United States v. Sturgis*, 14 Fed. Rep. 810.

²⁶ *Conrad v. Ins. Co.*, 1 Pet. 453; *Shrew v. Jones*, 2 McLean, 78; *Cropsey v. Crandall*, 2 Blatchf. 841; *Carroll v. Watkins*, 1 Abb. U. S. 474; *Lombard v. Bay-*

ard, 1 Wall. Jr. 196; *Barth v. Makeever*, 4 Biss. 206; *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 271; *Trapnall v. Richardson*, 18 Ark. 543, 58 Am. Dec. 338; *Doyle v. Wade* (Fla.), 1 South. Rep. 516; *Hall v. Green*, 60 Miss. 47; *Branch v. Lowery*, 31 Tex. 96; *United States v. Duncan*, 12 Ill. 523; *Sellers v. Corwin*, 5 Ohio, 398, 24 Am. Dec. 301.

a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts."⁸⁷ As a necessary consequence of this doctrine it was held that state statutes requiring judgments to be recorded in the county in which the land lies could have no effect upon the lien of the judgment of a federal court.⁸⁸ But congress has recently passed an act which materially changes the law in this respect, and in effect puts the judgments of the federal courts upon the same footing with those of the state courts, in respect to the territorial extent of their lien. The wording of the act is given in a note.⁸⁹ The purport of this statute appears to be as follows: 1. The judgment of a federal court will become a lien upon real property situated in the

⁸⁷ *Massingill v. Downs*, 7 How. 760.

⁸⁸ *Doyle v. Wade* (Fla.), 1 South. Rep. 516; *Carroll v. Watkins*, 1 Abb. U. S. 474. Compare *Hall v. Green*, 60 Miss. 47.

⁸⁹ Act of Congress of August 1, 1888 (25 U. S. Stats. at L. 357), provides as follows: "That judgments or decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: *Provided*, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the Unit-

ed States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state.

"Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

"Sec. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county or parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county." See this statute construed in *Alsop v. Moseley* (N. Car.), 10 S. E. Rep. 124.

county where the court was sitting at the time of its rendition, at all events and without any reference to docketing, etc., under state laws.

2. The judgment may become a lien on property situated within the state, but in a different county, upon these two conditions: (a) that the state laws authorizing the transfer of a judgment, for purposes of lien, from one county to another, expressly include judgments of the federal courts in the description of the judgments which may be so transferred; and (b) that the requirements of such state laws, in regard to docketing the judgment in the second county, be complied with.

A judgment in favor of the United States, recovered in one of the federal courts *out of* the state of New York, is not a lien upon lands *within* that state from the docketing of the judgment, although, by the law of the United States, an execution on such judgment may be issued against the defendant's property in any state of the Union.⁸⁰

§ 416. Decrees in Admiralty.

A final decree in admiralty in the United States district court in a suit *in personam*, for the payment of money, is a lien on the lands of the defendant in the district. "Exclusive original jurisdiction in admiralty and maritime cases is conferred upon the district courts of the United States, but the circuit courts hear such cases on appeal, and, as a matter of daily practice, render decrees therein for the payment of money; and it is not to be doubted, we think, that such decrees are as much within the provisions under consideration as decrees in equity; and if so, no reason is perceived why the same rule should not be applied to decrees of a like character rendered in the district courts."⁸¹

⁸⁰ *Manhattan Co. v. Evertson*, 6 Paige, 457.

⁸¹ *Ward v. Chamberlain*, 2 Black, 480.

PART III. TO WHAT PROPERTY THE LIEN ATTACHES.

§ 417. Territorial Restriction of Lien.

Although a judgment *in personam* has the effect of establishing a claim against the defendant which follows his person and may be enforced against him, by some appropriate proceeding, wherever he may be found, yet it can be collected by the direct process of execution only within the territory over which the court rendering the judgment has jurisdiction and within which its process may run. Hence, as a general rule, the judgment constitutes a lien only upon the real estate of the debtor lying within such territorial limits. A judgment rendered in one state or country is not a lien upon land in another state or country.⁸² In order to have that effect, it must be made the basis of a suit and judgment in the second state or country, and then the lien will attach as an incident of the second judgment, not the first. And even within the limits of the same state, unless it is otherwise provided by the statutes, the lien of a judgment attaches only to the real estate of the debtor which lies within the particular county where the judgment was rendered and docketed.⁸³ But where a judgment-lien attaches upon lands in a certain county, and afterwards a new county is set off, within which these lands (or part of them) fall, the lien does not cease to exist by reason of such new organization, but holds during the full period allowed by statute without any further record.⁸⁴ "It is supposed that when a new

⁸² *Billan v. Hercklebrath*, 23 Ind. 71. But where a judgment was recovered in M. county, Virginia, and became a lien on lands in B. county, its lien was neither lost nor impaired by reason of the division of the state of Virginia into two states and the falling of M. county into the state of West Virginia. *Gatewood v. Goode*, 23 Gratt. 880.

⁸³ *King v. Portis*, 77 N. Car. 25; *Baker v. Chandler*, 51 Ind. 85; *State Bank v. Carson*, 4 Nebr. 498; *Goodell v. Blumer*, 41 Wis. 436; *Farmers' Bank v. Heighe*, 8 Md. 857. In Alabama it was held, in

1843, that the lien of a judgment in any court of record of the state extended to all the lands of the judgment debtor within the state. *Campbell v. Spence*, 4 Ala. 548, 39 Am. Dec. 801. And in Pennsylvania, in 1792, a similar ruling was made in regard to the effect of a judgment in the supreme court. *Ralston v. Bell*, 2 Dall. 158.

⁸⁴ *Davidson v. Root*, 11 Ohio, 98, 37 Am. Dec. 411; *Bowman v. Hovions*, 17 Cal. 471; *Hays's Appeal*, 8 Pa. St. 182; *West's Appeal*, 5 Watts, 87.

county is organized, with no saving clause in the act, and land subject to a judgment-lien in the old county falls within the new organization, the lien ceases to exist. We do not think so. The lien being given by express provision, although it is admitted, as a part of the remedy, to be within the control of the legislature, must, nevertheless, remain until lost by the act of the judgment creditor, or taken away by subsequent legislation."⁹⁶

§ 418. Transfer of Judgment to Another County.

In many of the states there are statutes authorizing a transcript of a judgment recovered in one county to be docketed in another, for the purpose of binding lands of the judgment debtor situated in the latter county.⁹⁶ Such a transfer, however, does not destroy the lien of the judgment on the debtor's property in the county where it was originally docketed.⁹⁷ But on the other hand, if the statute enacts that its lien shall continue in the second county for a prescribed term after the filing of the transcript there, it is held that the lien will bind the land in the second county during the whole of such term, although, in the interval, it may have expired by limitation in the first county.⁹⁸ It is to be noted that a transcript thus entered in another county is not a judgment of the court to which transferred, but a *quasi* judgment for certain limited purposes, such as lien, execution, and revival. Hence if the original judgment is set aside for irregularity, the judgment on the transcript will fall with it.⁹⁹ Another consequence of this principle is that no authority can be derived from the statute for a transfer of the same judgment from the second county to a third,—that would be merely an exemplification of an exemplification. If it is desired to bind lands in a third county, a transcript must be taken directly from the first.¹⁰⁰ And when a judgment is so transferred, its merits cannot be inquired into at all by

⁹⁶ Davidson v. Root, 11 Ohio, 98, 87 Am. Dec. 411.

⁹⁷ Farmers' Bank v. Heighe, 8 Md. 357; Goodell v. Blumer, 41 Wis. 436; Perry v. Morris, 65 N. Car. 231; Nell v.

Colwell, 66 Pa. St. 216; Code Civil Proc. Cal. § 674.

⁹⁷ Perry v. Morris, 65 N. Car. 221.

⁹⁸ Donner v. Palmer, 23 Cal. 40.

⁹⁹ Brandt's Appeal, 16 Pa. St. 343.

¹⁰⁰ Mellon v. Guthrie, 51 Pa. St. 116.

the court to which it is taken; it is there only for purposes of enforcement and satisfaction.¹⁰¹ In regard to the requisites of the transcript, it is necessary that it should be sufficient to give reasonably certain and definite information to subsequent purchasers or lienors. It is held to answer this requirement if it sets out the date of the rendition of the judgment, the names of the parties to the suit, the amount of the debt, and the costs of the action.¹⁰² If the statute provides that "judgments at law" may be thus transferred from one county to another, this term will not be given an extensive signification, but will be taken in its strict meaning. Thus, a verdict, without the rendition of judgment upon it, is not capable of being taken to another county for purposes of lien.¹⁰³ And under a statute worded as above, a decree of a court of equity cannot be thus transferred to another county, although it be for the payment of a definite sum of money.¹⁰⁴ But a valid and subsisting judgment may be transferred after the death of the plaintiff, and the suggestion of death and substitution of the administrator may be made either before or after the transfer.¹⁰⁵

§ 419. Lien binds Real Estate.

The language usually employed in statutes on this subject is to the effect that judgments shall be a lien on the "real estate" or "real property" of the defendant. These terms serve well enough to exempt chattels from this operation of a judgment, but leave room for a certain ambiguity as to the various species of estates and interests in land which may possibly come under the designation of realty. These questions will be examined in succeeding sections. It has been held that judgments against a turnpike company are not liens upon the turnpike road.¹⁰⁶ And under the laws of Texas regulating railways, a railroad is not considered real estate within the meaning of a statute which makes the judgment of a court of record a lien on the "real estate" of the debtor.¹⁰⁷ But if the laws of the particular

¹⁰¹ King v. Nimick, 84 Pa. St. 297.

¹⁰² Wilson v. Patton, 87 N. Car. 318.

¹⁰³ Bailey v. Eder, 90 Pa. St. 446.

¹⁰⁴ Brooke v. Phillips, 88 Pa. St. 183.

¹⁰⁵ Walt v. Swinehart, 8 Pa. St. 97.

¹⁰⁶ Beam's Appeal, 19 Pa. St. 453.

¹⁰⁷ Scogen v. Perry, 32 Tex. 21.

state are so framed as to give the character of fixtures to the rolling stock of a railroad, then such stock will be subject to the lien of a judgment.¹⁰⁸

§ 420. Actual Interest of Debtor bound.

The lien of a judgment attaches to the precise interest or estate which the judgment-debtor has, actually and effectively, in the land. By this is meant that, as the recovery of a judgment against him cannot of itself operate to change the quantity of his interest in the property, so its lien cannot be made effectual to bind or convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated. Hence it is of no consequence that he may have an *apparent* or colorable interest greater than would pass by his conveyance of the title; the lien has no effect except upon his actual estate, legal or equitable, according as the law varies in the different jurisdictions.¹⁰⁹ "The general lien of a judgment-creditor upon the lands of his debtor is subject to all equities which existed against such lands in favor of third persons at the time of the recovery of the judgment. And the court of chancery will so control the legal lien of the judgment-creditor as to restrict it to the actual interest of the judgment-debtor in the property, so as fully to protect the rights of those who have a prior equitable interest in such property or in the proceeds thereof."¹¹⁰ "The moment a judgment is docketed it becomes in law a general lien on all the real estate of the debtor, not only as against himself, but also as against all other persons deriving title through or under him subsequent to

¹⁰⁸ Railroad Co. v. James, 6 Wall. 750.

¹⁰⁹ Baker v. Morton, 12 Wall. 150; *In re Estes*, 6 Sawy. 459, 8 Fed. Rep. 184; Sanford v. McLean, 8 Paige. 117; Coombs v. Jordan, 8 Bland, 284. 22 Am. Dec. 286; *Ex parte Trenholm*, 19 S. Car. 126; Blankenship v. Douglass, 26 Tex. 225, 82 Am. Dec. 608; Holden v. Garrett, 23 Kans. 98; Doswell v. Adler, 28 Ark. 82; Unknown Heirs v. Kimball, 4 Ind. 546, 58 Am. Dec. 638; Sharpe v.

Davis, 76 Ind. 17; Heberd v. Wines, 105 Ind. 237, 4 N. E. Rep. 457; Churchill v. Morse, 28 Iowa, 229, 92 Am. Dec. 422; Union Bank v. Maynard, 51 Mo. 548; Uhl v. May, 5 Nebr. 157; Galway v. Malchow, 7 Nebr. 285; Colt v. Du Bois, 7 Nebr. 391; Berkley v. Lamb, 8 Nebr. 392; Nessler v. Neher, 18 Nebr. 649, 23 N. W. Rep. 845.

¹¹⁰ Buchan v. Sumner, 2 Barb. Ch. 207, 47 Am. Dec. 305.

such judgment. It affects the legal estate, and the lien of the judgment cannot at law be detached or defeated by any species of alienation whatsoever." ¹¹¹ A judgment is not a lien on land unless there is a legal or equitable seisin of the judgment-debtor; but where he is the actual possessor, that is sufficient, for actual possession is *prima facie* evidence of title.¹¹² On the other hand, although the legal title to land is in one, yet if another has actual possession, a judgment against the former is a lien only upon his interest, whatever that may be, for the possession of the other is notice to all the world of his claims.¹¹³ In Illinois it is held that a judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of notice from other sources.¹¹⁴

§ 421. Title held in Trust.

The lien of a judgment does not in equity attach upon the mere legal title to land existing in the defendant, when the equitable title is in a third person.¹¹⁵ And transitory seisin of lands by the judgment-debtor, in trust for another, will not subject the lands to the judgment-lien.¹¹⁶ To illustrate, in a recent case it appeared that A. agreed to purchase three lots from B. as agent for C., and the deed was made out to A., but he declined to receive it on the ground that he could not pay for the lots and had agreed to let D. have them at the stipulated price. The agent refused to alter the deed, and D. paid the money to him, and A. conveyed the property to D. It was held that under these circumstances a judgment against A. was not a lien on the lands conveyed to D. The court observed that A. "was vested with the naked legal title. The conveyance was made to him as a matter of convenience. He was a mere conduit, and held the legal title in trust for D. Under such circumstances

¹¹¹ *Morris v. Mowatt*, 2 Paige, 586, 22 Am. Dec. 661.

¹¹² *Jackson v. Town*, 4 Cow. 599, 15 Am. Dec. 405.

¹¹³ *Uhl v. May*, 5 Nebr. 157; *Lumbard v. Abbey*, 78 Ill. 177; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740.

¹¹⁴ *Massey v. Westcott*, 40 Ill. 160.

¹¹⁵ *Ellis v. Tousley*, 1 Paige, 380; *Lounsbury v. Purdy*, 11 Barb. 490; *Withnell v. Courtland Wagon Co.*, 25 Fed. Rep. 372; *Hays v. Regar*, 102 Ind. 524, 1 N. E. Rep. 886. See also *Fulton's Estate*, 51 Pa. St. 204.

¹¹⁶ *Aicardi v. Craig*, 43 Ala. 311.

A. had no interest on which the judgment became a lien. His creditors can only get what he had, and what he had was of no pecuniary value."¹¹⁷ So where a grantee is named in a conveyance and designated as "trustee," this is sufficient to allow him to hold the title for the unnamed beneficiary, if one actually exists, and a judgment and levy of execution against the trustee individually are a lien only on his personal interest, if any, in the property.¹¹⁸ So in an action against a partner, who held the legal title to a mine in trust for the benefit of the firm, to enforce a lien for labor performed thereon, where judgment is rendered against him, only his interest in the mine can be sold to satisfy such lien.¹¹⁹ Another important application of this principle is in the case where one sells and conveys real estate to which he has no title, or an imperfect title, at the time of the sale, and subsequently acquires a perfect title, the same then enuring to the benefit of the grantee. If, between the date of the conveyance and the acquisition of the perfect title, a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment.¹²⁰ The case of *Carter v. Challen*¹²¹ was decided on similar principles. It there appeared that a tract of land was sold by the sheriff and a deed therefor made to the purchaser, who soon afterwards died intestate. An execution against one of the heirs of the purchaser was levied on what was supposed to be the heir's undivided half interest in the land. But the present plaintiff enjoined a sale under the execution, claiming to be the equitable owner. It was shown that the plaintiff paid the purchase-money, had always been in possession of the land, his possession being prior to the date of the judgment, and had exercised rights of and claimed ownership, and that the purchaser did not claim ownership in his lifetime. It was held that the transaction created a resulting trust in favor of the plaintiff, superior to the lien of the judgment, as the continuous possession by the plaintiff was sufficient constructive notice of ownership.

¹¹⁷ *Atkinson v. Hancock*, 67 Iowa, 452, 25 N. W. Rep. 701.

¹¹⁸ *Boardman v. Willard*, 73 Iowa, 20, 34 N. W. Rep. 487.

¹¹⁹ *Rosina v. Trowbridge* (Nevada), 17 Pac. Rep. 751.

¹²⁰ *Watkins v. Wassell*, 15 Ark. 73.

¹²¹ 88 Ala. 185, 8 South. Rep. 313.

§ 422. Inchoate Title.

On the general principle that a judgment-lien attaches to the precise interest which the debtor has in the land, whatever that interest may be, the authorities hold that the lien may be considered as binding several species of inchoate or inceptive titles. Thus a purchaser at a sale under order of the probate court acquires an inceptive title or interest in the property so purchased at the time it is struck down to him, and judgments entered against him subsequent to the sale, but prior to its confirmation by the court, are a lien upon such interest subject to the future confirmation of the sale.¹²² So a purchaser at sheriff's sale, before his deed has been acknowledged, has an inceptive interest in the land by the contract, which may be bound by the lien of a judgment.¹²³ And numerous cases have decided that a judgment-lien will attach to land which has been purchased from the government, in advance of the issuance of a patent to the buyer.¹²⁴ But it is also held, and with much show of reason, that a judgment is not a lien upon a mere right of pre-emption.¹²⁵

¹²² *Holmes' Appeal*, 106 Pa. St. 23. But a purchaser who has utterly failed to comply with the terms of sale, has no estate in the premises, legal or equitable, to be bound by a judgment-lien. *Jacobs' Appeal*, 28 Pa. St. 477.

¹²³ *Morrison v. Wurtz*, 7 Watts, 427; *Slater's Appeal*, 28 Pa. St. 169.

¹²⁴ *Levi v. Thompson*, 4 How. 17; *Landes v. Brant*, 10 How. 348; *Huntington v. Grantland*, 33 Miss. 453; *Jackson v. Williams*, 10 Ohio, 69; *Rogers v. Brent*, 5 Gilm. 573; *Cavender v. Smith*, 5 Iowa, 157.

¹²⁵ *Harrington v. Sharp*, 1 Greene (Iowa), 181, 48 Am. Dec. 365. In this case the court said: "Under our statute a judgment is a lien only on the 'real estate of the person' against whom it was rendered. By the language 'real

estate of the person,' we understand that the fee-simple, or estate of inheritance, must be in the person, in order to have the judgment against him operate as a lien upon the land. A mere pre-emption right confers no such fee or estate upon a person. It is but a temporary and conditional interest, unknown to the common law. It only imparts to the pre-emptioner a right over others to purchase the land within a limited period, at a stipulated price, and if he fails to pay the price within the time required, the right ceases. It is of a nature no greater than an estate for years—a mere equitable and contingent interest; and hence we are firmly of opinion that a judgment cannot operate as a lien upon a pre-emption right to lands."

§ 423. Land Fraudulently Conveyed.

Where a person has aliened his land by a conveyance which is in fraud of his creditors, and afterwards a judgment is recovered against him, many of the authorities hold that such judgment does not attach as a lien upon the land, at least until the commencement of an action by the judgment-creditor to set aside the conveyance; on the ground that the fraudulent conveyance is not void, but voidable, and that it is valid as between the parties, and as to the plaintiff, until attacked.¹²⁰ In one of the cases cited in the margin, Judge Deady, after an extensive review of the authorities, expressed himself as follows: "In my own opinion the lien of a judgment which is limited by law to the property of or belonging to the judgment-debtor at the time of the docketing, does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another, by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void,' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a *bona fide* purchaser. The operation of the lien of a judgment, being limited by statute to the property then belonging to the judgment-debtor, is not a mode prescribed by which a creditor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other

¹²⁰ *Miller v. Sherry*, 2 Wall. 249; *Mulford v. Peterson*, 85 N. J. L. 127; *Brooks v. Wilson*, 6 N. Y. Supp. 116; *Neal v. Foster*, 86 Fed. Rep. 29; *Rapley v. International Bank*, 98 Ill. 896; *Manhattan Co. v. Evertson*, 6 Paige, 465; *McKee v. Gilchrist*, 8 Watts, 280; *In re Estes*, 8 Fed. Rep. 184.

act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it."¹²⁷

But on the other hand, many well considered cases hold that a subsequent judgment is a lien on land previously conveyed in fraud of creditors, and that the judgment-creditor may treat the conveyance as simply void, and may rest exclusively upon his legal remedies, without invoking the aid of a court of equity; that is, he may proceed to sell the land upon execution, leaving it to the sheriff's vendee to impeach the fraudulent conveyance.¹²⁸ According to another view, if the debtor has fraudulently conveyed away or incumbered his real estate, so as to interpose an obstacle which embarrasses

¹²⁷ *In re Estes*, 8 Fed. Rep. 181, 141.

¹²⁸ *Jackson v. Holbrook*, 36 Minn. 494, 32 N. W. Rep. 852; *Chautauqua Co. Bank v. Risley*, 19 N. Y. 869, 75 Am. Dec. 347; *Dunham v. Cox*, 10 N. J. Eq. 487, 64 Am. Dec. 460; *Eastman v. Schettler*, 18 Wis. 324; *Smith v. Morse*, 2 Cal. 524; *In re Lowe*, 19 Fed. Rep. 589; *Slattery v. Jones*, 96 Mo. 216, 8 S. W. Rep. 554. In *Jackson v. Holbrook*, *supra*, the choice of remedies open to the judgment-creditor is indicated as follows: "A judgment-creditor seeking relief against prior fraudulent conveyances of land has the choice of three remedies. He may sell the debtor's land upon execution issued on his judgment, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or, thirdly, he may, on the return of an execution unsatisfied, bring an action in the nature of a creditors' bill, to have the conveyance adjudged fraudulent and void as to his judgment, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as in the case of equitable interests the debtor's assets are reached and

applied. *Erickson v. Quinn*, 15 Abb. Pr. (N. S.) 168. In the first two classes, the creditor enforces his judgment at law, and the sale upon execution must necessarily be subject to prior statutory liens. The purchaser in such cases succeeds to such title only as the debtor had, treating the debtor's fraudulent transfer as void. *Freem. Ex'ns*, § 447. As to cases falling within the second class, the object of the equitable suit is to make the legal remedy more effective. In such case, no trust is created in respect to the property, but the creditor falls back upon his legal remedy, and, instead of bringing his equitable suit before the sale, he may, if necessary, maintain it after sale in the form of an action to remove a cloud from his title. *Erickson v. Quinn*, *supra*. And where assets are applied by the court in creditors' suits, as respects real estate, the rule is, as in other cases, to prefer prior liens, in the distribution. 'Where the law gives priority, equity will not destroy it; and especially where legal assets are created by statute as judgment-liens, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery.' *Kent, C. J.*, *Codwise v. Gelston*, 10 Johns. 523; *Scouton v. Bender*, 8 How. Pr. 185; *Wiswall v. Sampson*, 14 How. 67."

the creditor in appropriating it by legal process in satisfaction of his debt, then the latter may file his bill to remove out of the way such fraudulent conveyance or incumbrance, and it is not necessary for him to first take out execution on his judgment, for the judgment is a lien on the land.¹²⁰ But of course these rules only apply in cases where the conveyance was made with intent to hinder and defraud creditors. Thus a judgment is not a lien on land which the debtor has previously conveyed in good faith to his son, in trust for his wife, to pay a debt really due her.¹²¹ And in any other case where the fraudulent purpose was clearly wanting, the judgment would be no lien.

§ 424. Exempt Property.

In the nature of things, a judgment cannot operate as a lien upon any property which is by law exempt from seizure and sale on execution. Under a statute providing that judgments shall be liens on real estate subject to execution, where the entire property of a resident householder at the time of the rendition of a judgment is less in value than the amount allowed by law as exempt from execution, and so continues, the judgment does not become a lien on his real estate, and his grantee takes it free from any lien of the judgment or execution issued upon it.¹²²

§ 425. Homestead Property.

Since land held as a homestead is not liable to levy and sale on execution, it is not bound by the lien of a judgment against the owner. Hence, while the land retains this character, the owner will not be deterred from placing incumbrances upon it, or even alienating it, by the fact that there are judgments outstanding against him.¹²³ But a judgment-lien against property acquired *before* the

¹²⁰ *Dunham v. Cox*, 10 N. J. Eq. 487, 44 Am. Dec. 460.

¹²¹ *Benson v. Maxwell* (Pa.), 14 Atl. Rep. 161.

¹²² *Dumbould v. Rowley*, 113 Ind. 358, 15 N. E. Rep. 468.

¹²³ *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516; *McDonald v. Badger*, 28 Cal. 400, 88 Am. Dec. 123; *Sullivan v. Hendrickson*, 54 Cal. 258; *Monroe v. May*, 9 Kans. 466; *Gapen v. Stephenson*, 17 Kans. 618; *Lamb v. Shays*, 14

filing of a declaration of homestead by the debtor and his wife, or before the debtor's marriage, or otherwise before the land acquires the character of a homestead, subjects such property to sale under execution; such lien cannot be divested by any subsequent act of the owners.¹²⁰ And if the property loses its character as a homestead, it then becomes subject to existing and future judgments. Thus, under a law which enacts that the homestead exemption shall exist "so long as the same shall be owned and occupied by the debtor as such homestead," a judgment against the owner of land is a lien which remains dormant while the land is so occupied, but it becomes living and operative as soon as the homestead occupation is abandoned.¹²¹ In that event, all existing judgments will attach together as of the date of the abandonment, but without regard to their seniority, and priority will belong to the creditor who first manifests his diligence by levying on the property.¹²² It is evident that if an abandonment of the homestead character of the land precedes the debtor's alienation of it by such an interval of time that the two acts cannot be considered as parts of the same transaction, the liens of existing judgments will attach, and the property will go to the purchaser burdened with such liens.¹²³ But a more difficult question arises in case the relinquishment of the homestead consists in the very act of selling it. According to the decisions in some of the states, if the owner of a homestead attempts to alienate the land *ipso facto* he abandons its character as a homestead, and at the same instant the liens of existing judgments against him attach to the property, and the purchaser must therefore take it charged with such liens.¹²⁷ This view is based

Iowa, 537; Wiggins v. Chance, 54 Ill. 175; Black v. Epperson, 40 Tex. 162; Briggs v. Briggs, 45 Iowa, 318; Grimes v. Portman (Mo.), 12 S. W. Rep. 792.

¹²⁰ Kennerley v. Swartz, 88 Va. 704, 8 S. E. Rep. 349; Smith v. Richards (Idaho), 21 Pac. Rep. 419, citing Freeman on Executions, §§ 249, 249d, 249e; Thompson on Homestead, § 317; Smyth on Homestead, § 35; Platt on Married Women, § 71; Kelly v. Dill, 28 Minn. 435; Bullene v. Hiatt, 12 Kans. 82; Robinson v. Wilson, 15 Kans. 448; Bartholo-

mew v. Hook, 28 Cal. 278; Rix v. Mo-Henry, 7 Cal. 89; Elston v. Robinson, 21 Iowa, 532.

¹²¹ Kellerman v. Aultman, 80 Fed. Rep. 888.

¹²² Bliss v. Clark, 89 Ill. 596; McDonald v. Crandall, 43 Ill. 231.

¹²³ Ackley v. Chamberlain, 16 Cal. 181; Marriner v. Smith, 27 Cal. 649; Green v. Marks, 25 Ill. 222.

¹²⁷ Kellerman v. Aultman, 80 Fed. Rep. 888; Eaton v. Ryan, 5 Nebr. 47; State Bank v. Carson, 4 Nebr. 498; Moore v.

upon the wording of the statutes, and probably does not universally prevail. Under a law providing that homesteads shall be exempt from any execution issued on a money judgment, a judgment allowing the plaintiff in divorce to recover of the defendant a certain sum of money will not constitute a lien on the defendant's homestead estate.¹³⁸

§ 426. Life-Estates.

A judgment against a devisee of a life-estate, existing and unsatisfied at the time of the testator's death, becomes thenceforth a lien upon the interest devised.¹³⁹ So where a testator devised certain real estate to his executors in trust for his son, directing the trustees to "permit and suffer" the son "to have, receive, and take the rents, issues, and profits thereof for the term of his natural life," and, after the son's death, devising the same land to the son's heirs at law, it was held that the trust so attempted to be created was a passive one, and invalid under the statute, and that the son took a life-estate upon which a judgment against him was a lien.¹⁴⁰ But where an estate for life is subject to be divested by the breach of a condition subsequent, a breach which forfeits the estate destroys the lien thereon of a judgment against the tenant for life.¹⁴¹ So a judgment recovered against a devisee for life, vested, under the will, with power to consent that the executors shall sell the real estate at their discretion and appropriate the income for the support of the devisee and his family during his life, does not work an extinguishment of the power; but the lien of the judgment is subject to the power.¹⁴²

§ 427. Estates by Curtesy.

A judgment against a husband is a lien on his life-interest in the wife's lands, although execution is suspended until her death.¹⁴³ And

Granger, 80 Ark. 574; Jackson v. Allen, 80 Ark. 110; Folsom v. Carli, 5 Minn. 835 (Gil. 264); Tillotson v. Millard, 7 Minn. 518 (Gil. 419); Hoyt v. Howe, 8 Wis. 752; Whitworth v. Lyons, 39 Miss. 467.

¹³⁸ Stanley v. Sullivan, 71 Wis. 585, 87 N. W. Rep. 801.

¹³⁹ Bridge v. Ward, 35 Wis. 687.

¹⁴⁰ Verdin v. Slocum, 71 N. Y. 845.

¹⁴¹ Moore v. Pitts, 58 N. Y. 85.

¹⁴² Leggett v. Doremus, 25 N. J. Eq. 122.

¹⁴³ Anderson v. Tydings, 8 Md. 427, 68 Am. Dec. 708; Beard v. Deitz, 1 Watta, 809.

a judgment against a tenant by the curtesy initiate after issue born, binds his estate in his wife's lands which have been ordered to be appraised in proceedings in partition, but which have not been accepted or sold at the date of the recovery of the judgment.¹⁴⁴

§ 428. Reversions and Remainders.

Estates in reversion or in remainder, if vested, are legal estates and subject to sale under execution, or liable to be taken under an *elegit*. They are therefore subject to the lien of judgments against the reversioner or remainder man.¹⁴⁵ The purchaser would of course succeed to the precise interest of the judgment-debtor, and would not be entitled to the immediate possession unless, or until, the latter would be so entitled. "A judgment is a lien upon all lands of which the defendant was seised or entitled to, or any estate in lands to which he was entitled, at the time of the entry of the judgment or at any time after. A remainder or reversion, if vested, can be levied upon and sold for the payment of such judgment."¹⁴⁶ A reversion after an estate for life is bound by a judgment obtained against the ancestor from whom it immediately descended.¹⁴⁷ In cases where the debtor's interest is not vested but contingent, the authorities are not so harmonious. In several of the states it is held that a contingent remainder is not liable to be sold on execution and hence not subject to the lien of a judgment.¹⁴⁸ But in Pennsylvania it has been held that where a judgment has been obtained against a man who has an interest in property, either by way of executory devise or contingent remainder, it is a lien upon such interest; and although the lien might not become effective until the estate vested, yet it must be preferred to such liens as have been obtained after the party has acquired a complete title.¹⁴⁹

¹⁴⁴ Bank v. Stauffer, 10 Pa. St. 393.

¹⁴⁵ Williams v. Amory, 14 Mass. 20; Brown v. Gale, 5 N. H. 416; Woodgate v. Fleet, 44 N. Y. 1; Humphreys v. Humphreys, 1 Yeates, 427; Den dem. Rickey v. Hillman, 7 N. J. L. 180; Bockover v. Ayres, 23 N. J. Eq. 13.

¹⁴⁶ Bockover v. Ayres, 23 N. J. Eq. 13.

¹⁴⁷ Burton v. Smith, 13 Pet. 464.

¹⁴⁸ Allston v. Bank, 2 Hill (S. Car.) Eq. 235; Watson v. Dodd, 68 N. Car. 528; Jackson v. Middleton, 52 Barb. 9.

¹⁴⁹ Ogden v. Knepler, 1 Pears. (Pa.) 145.

§ 429. Leasehold Interests.

At the common law a leasehold interest, or estate in land for years, was regarded as only a chattel interest and was therefore not bound by the lien of a judgment against the holder, although, like any other species of personal property, it might be levied upon and sold under execution.¹⁵⁰ And this view is still held in some of the states.¹⁵¹ But in several other jurisdictions, under the construction given to their particular statutes, leasehold interests are regarded and treated as real estate, and hence are subject to the lien of judgments.¹⁵² In Iowa, a building on leasehold property, which the tenant has a right to remove at the end of his term, is, with the interest of the tenant in the land, subject to the lien of a judgment against him, which is paramount to the lien of a subsequent mortgage executed by him.¹⁵³ In New York, the code provides that the term "real property," as used in the laws relating to the execution sale of land, shall apply to leasehold property where the lessee, or his assignee, at the time of sale, is possessed of "at least five years unexpired term of lease." Consequently a judgment, though duly docketed, is not a lien on the judgment-debtor's interest in the unexpired term of a lease having but two years to run.¹⁵⁴ And judgments do not attach to leasehold premises unless where there is possession in the lessee.¹⁵⁵ In regard to leases which give the tenant the privilege of purchase, there is some difference of opinion. In an early case in Pennsylvania, where a lease was made to one and his heirs for forty-nine years, reserving to the lessee a privilege of building, with a covenant by the lessor to purchase the improvements at the end of forty-nine years or convey the land to the lessee, his heirs and assigns, at a valuation, and the

¹⁵⁰ *Merry v. Hallett*, 2 Cow. 497; *Vredenburg v. Morris*, 1 Johns. Cas. 223; *Northern Bank v. Roosa*, 18 Ohio, 334.

¹⁵¹ *Krause's Appeal*, 2 Whart. 398; *Association v. Bolster*, 92 Pa. St. 123.

¹⁵² *Northern Bank v. Roosa*, 18 Ohio, 334; *First Nat. Bank v. Bennett*, 40 Iowa, 537; *McLean v. Rockey*, 8 McLean, 235; *Steers v. Daniel*, 4 Fed. Rep.

587. In the case last cited this construction is given to the statutes of Tennessee.

¹⁵³ *Haden v. Goppinger*, 67 Iowa, 106, 24 N. W. Rep. 743.

¹⁵⁴ *Taylor v. Wynne*, 8 N. Y. Supp. 759, construing Code Civil Proc. N. Y. § 1430.

¹⁵⁵ *Crane v. O'Connor*, 4 Edw. Ch. 409.

lessee afterwards erected valuable buildings, it was held that the lessee had such an interest in the land as was bound by a judgment against him. "He had an interest greater than leasehold; eventually it might be fee simple."¹⁵⁶ And a similar ruling has recently been made in Illinois.¹⁵⁷ But in Iowa it is held that a judgment-creditor cannot maintain an action in equity to establish the lien of his judgment upon land in the possession of the judgment-debtor, under a lease for a term of years, with the right, if he so elects, to purchase the land at a designated price, as no lien can attach upon the mere *option* of the debtor.¹⁵⁸

§ 430. Land held by Joint Owners.

A judgment against a tenant in common or copartner is a lien upon the interest of the debtor in the land, and if upon a partition this interest is converted into money, the priority of the judgment-lien is preserved as against the fund.¹⁵⁹ It is to be observed that a judgment against a tenant in common does not prevent a partition, at his instance against whom the judgment is, or that of any other of the tenants. If partition is made, the lien of the judgment will attach to the part allotted to the defendant in the judgment.¹⁶⁰ In a case in Maryland, it appeared that H. and G. made a parol agreement to purchase certain real estate jointly; the negotiations were intrusted to G., and he made the purchase alone and on his own credit; he also gave a bond for the purchase-money and took possession; but G. subsequently proved unable to meet his share of the purchase-money, and H. advanced it and took a conveyance in fee from G. and the original grantor. Upon this state of facts it was held that judgments rendered against G. prior in date to such conveyance were liens on his interest in the land, but as to those ren-

¹⁵⁶ Ely v. Beaumont, 5 Serg. & R. 124.

¹⁵⁷ Gorham v. Farson, 119 Ill. 425, 10 N. E. Rep. 1.

¹⁵⁸ Sweezy v. Jones, 65 Iowa, 272, 21 N. W. Rep. 608.

¹⁵⁹ Eldridge v. Post, 20 Fla. 579; Garvin v. Garvin, 1 S. Car. 53.

¹⁶⁰ Barrington v. Clarke, 2 Pen. & Watts, 115, 21 Am. Dec. 483; Longwell v. Bentley, 28 Pa. St. 108; Williard v. Williard, 56 Pa. St. 127; Argyle v. Dwinnel, 29 Me. 45.

dered subsequent to that period, H. was entitled to relief by perpetual injunction against them.¹²¹

§ 431. Partnership Property.

A judgment against a partnership for a firm debt, entered by confession of all the partners, is a lien upon the partnership real estate.¹²² And so also a judgment of a separate creditor against one of the partners will be a lien on the firm property, although subordinated to all claims against the partnership as such. Where realty is purchased with partnership funds and held and used for partnership purposes, though the legal title is in the name of individual partners, the statutory lien of a judgment of a separate creditor, on such land, must be postponed to the equity of a firm creditor whose claim accrued during the continuance of the partnership, although subsequent to the time that such statutory lien attached. Such lien is good only to the extent of the residuary interest of the partners in the land, after the satisfaction of all claims against the partnership.¹²³ Conversely, a judgment against the firm is a lien on the separate real estate of the individual partners.¹²⁴ But where, upon a hearing before an auditor appointed to determine the validity of certain claims against an estate, a judgment obtained against the firm of which the decedent was a member was filed, it was held that as the record did not show the names of the individual partners, the judgment could not be charged upon the individual property of the decedent.¹²⁵

§ 432. After-Acquired Property.

In most of the states it is held that the lien of a judgment attaches to and binds land acquired by the debtor *after* the rendition and dock-

¹²¹ Hollida v. Shoop, 4 Md. 465, 59 Am. Dec. 83.

¹²² *In re* Coddling, 9 Fed. Rep. 849.

¹²³ Page v. Thomas, 43 Ohio St. 38, 1 N. E. Rep. 79, 2 A. C. 54 Am. Rep. 783. And see also Melly v. Wood, 71 Pa. St. 488; Hoskins v. Johnson, 24 Ga. 625.

¹²⁴ Cummings' Appeal, 25 Pa. St. 268, 64 Am. Dec. 695; Pitts v. Spotts (Va.), 9 S. E. Rep. 501. A contrary view is maintained in Stadler v. Allen, 44 Iowa, 198.

¹²⁵ Fox's Appeal (Pa.), 11 Atl. Rep. 228.

eting of the judgment; it being either so provided by statute, or by following the doctrines of the English common law.¹⁶⁶ But in two states—Pennsylvania and Ohio—it has been firmly settled from a very early day that the lien will not attach to after-acquired lands unless they are levied on, and consequently the debtor can make clear title to such lands in the interval, and execution cannot be levied on lands which the defendant got by purchase after the judgment, if he aliened them in good faith before levy.¹⁶⁷ And this doctrine has also been accepted in a few other states.¹⁶⁸ By the English common law the lien attached to subsequently acquired realty without a levy.¹⁶⁹ In Illinois, the rule is that where an execution is issued upon a judgment within one year from its rendition, the judgment will become a lien upon any real estate the judgment-defendant may acquire subsequent to its rendition and within seven years, but if no execution is issued thereon within a year, no lien will exist.¹⁷⁰ The lien of a judgment attaches to after-acquired property from the time the title vests in the debtor, but does not relate back to the date of the judgment. Hence the liens of all judgments in existence when the debtor acquires the property attach simultaneously and equally.¹⁷¹

¹⁶⁶ *Ridgely v. Gartrell*, 8 H. & McH. 449; *McClung v. Beirne*, 10 Leigh, 394, 34 Am. Dec. 739; *Handly v. Sydenstricker*, 4 W. Va. 605; *Ralston v. Field*, 32 Ga. 453; *Harrison v. Roberts*, 6 Fla. 711; *Moody v. Harper*, 25 Miss. 434; *Jenkins v. Gowen*, 37 Miss. 444; *Cayce v. Stovall*, 50 Miss. 396; *Thulemeyer v. Jones*, 37 Tex. 560; *Barron v. Thompson*, 54 Tex. 235; *Greenway v. Cannon*, 3 Humph. 177, 39 Am. Dec. 161; *Chapron v. Cassaday*, 3 Humph. 661; *Davis v. Benton*, 2 Sneed, 665; *Babcock v. Jones*, 15 Kans. 296; *Bank v. Watson*, 18 Ark. 74; *Ridge v. Prather*, 1 Blackf. 401; *Curtis v. Root*, 28 Ill. 367; *Wales v. Bogue*, 31 Ill. 464; *Steele v. Taylor*, 1 Minn. 274 (Gil. 210); *Colt v. Du Bois*, 7 Nebr. 391; *Leonard v. White Cloud*

Ferry Co., 11 Nebr. 340, 7 N. W. Rep. 533.

¹⁶⁷ *Calhoun v. Snider*, 6 Binn. 125; *Rundle v. Ettwein*, 2 Yeates, 23; *Packer's Appeal*, 6 Pa. St. 277; *Lea v. Hopkins*, 7 Pa. St. 492; *Moorhead v. McKinney*, 9 Pa. St. 265; *Waters' Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354; *Ross' Appeal*, 106 Pa. St. 82; *Roads v. Symmes*, 1 Ohio, 281, 18 Am. Dec. 631; *McCormick v. Alexander*, 3 Ohio, 65; *Stiles v. Murphy*, 4 Ohio, 42.

¹⁶⁸ *Harrington v. Sharp*, 1 Greene (Iowa), 181, 48 Am. Dec. 365; *Filley v. Duncan*, 1 Nebr. 184 (compare *Colt v. Du Bois*, 7 Nebr. 391).

¹⁶⁹ 4 Kent's Comm. *435-6.

¹⁷⁰ *Breed v. Gorham*, 106 Ill. 81.

¹⁷¹ *Cayce v. Stovall*, 50 Miss. 396. See *infra*, § 460.

§ 433. Equitable Estates and Interests.

At common law, and generally in the absence of a statute expressly giving to it that effect, the lien of a judgment does not extend to an *equitable* interest held by the judgment-debtor in the land.¹⁷³ For instance, a judgment is not a lien upon a possible equitable interest of the debtor in a tract of land, which interest arises out of a mistake made by the sheriff, in selling the land on execution, as to the quantity contained in the tract.¹⁷³ In many of the states, statutes have been enacted changing the common law rule and assimilating legal and equitable estates for purposes of lien and execution. But in cases of ambiguity in such acts, or lack of specific reference to equitable interests, considerable doubt has been expressed as to the propriety of departing from the ancient rule. Thus in Oregon, although the statute enacts that a judgment shall be "a lien on all real property of the judgment-debtor not exempt from execution, owned by him in the county at the time of docketing," yet it is held that a judgment at law is not a lien upon an equitable title in land.¹⁷⁴ On the other hand, in Maryland, it is considered that a judgment is a legal lien upon an equitable estate in lands, and binds them from its date, on the ground that the statute makes no distinction between the two species of interests.¹⁷⁵ Under the statutes of Iowa, judgments of superior courts are liens upon all interests of the judgment-debtor in real estate, whether legal or equitable, and it is immaterial, as between the parties, whether such interest appears of record or not.¹⁷⁶ In

¹⁷³ *Morsell v. First Nat. Bank*, 91 U. S. 857; *Brandies v. Cochrane*, 112 U. S. 844, 5 Sup. Ct. Rep. 194; *Withnell v. Courtland Wagon Co.*, 25 Fed. Rep. 372; *Jackson v. Chapin*, 5 Cow. 435; *Bogart v. Perry*, 1 Johns. Ch. 52; *Dixon v. Dixon*, 81 N. Car. 328; *Powell v. Knox*, 16 Ala. 364; *Kirkwood v. Koester*, 11 Kans. 471; *Baird v. Kirtland*, 8 Ohio, 21; *Russell v. Houston*, 5 Ind. 180; *Jeffries v. Sherburn*, 21 Ind. 112; *Harrington v. Sharp*, 1 Greene (Iowa), 181, 48 Am. Dec. 365; *Trask v. Green*, 9 Mich. 858; *Nessler v.*

Neher, 18 Nebr. 649, 26 N. W. Rep. 471; *Smith v. Ingles*, 2 Ore. 43; *Bloomfield v. Humason*, 11 Ore. 229, 4 Pac. Rep. 332.

¹⁷³ *Russell v. Houston*, 5 Ind. 180. See, a similar case, *Terrell v. Prestell*, 63 Ind. 86.

¹⁷⁴ *Smith v. Ingles*, 2 Ore. 43.

¹⁷⁵ *McMechen v. Marman*, 8 Gill & J. 57.

¹⁷⁶ *Lathrop v. Brown*, 23 Iowa, 40; *Blain v. Stewart*, 2 Iowa, 378.

Pennsylvania the same result is reached, but without the aid of a statute. The reason is thus stated by the court: "At common law an equitable estate is not bound by a judgment or subject to an execution, but the creditor may have relief in chancery. We have no court of chancery, and have therefore, from necessity, established it as a principle that both judgments and executions have an immediate operation on equitable estates."¹⁷⁷

Although at common law, and so far as regards the competence of the law courts, without the aid of a statute, there is no method of making a judgment-lien effectual upon a purely equitable estate in the land held by the debtor, yet it has always been held by the courts of chancery that, for their purposes, such interests were just as much bound by the judgment as any legal estate, and could be subjected to its satisfaction through the processes of equity.¹⁷⁸ "Courts of chancery, in adjusting the conflicting rights of creditors, following by analogy the principles of the common law, will, as far as equity and good conscience permit, regard a judgment as a lien upon the equitable real estate of the debtor."¹⁷⁹ In Tennessee a judgment creates a lien upon equitable estates in land, to be asserted in a court of chancery, co-extensive with the lien which at law exists upon legal estates, and which will in like manner attach to after-acquired equitable realty.¹⁸⁰

§ 434. Equity of Redemption.

It is generally held that a judgment creates a lien upon an equity of redemption of real estate from the time it is recorded.¹⁸¹ And a judgment-debtor cannot, by conveying his equity of redemption to a prior mortgagee, cut off the lien of a judgment.¹⁸² So a judgment

¹⁷⁷ *Auwerter v. Mathiot*, 9 S. & R. 402; *Carkhuff v. Anderson*, 8 Binn. 4; *Sample v. Mown*, 4 Phila. 85.

¹⁷⁸ *Unknown Heirs v. Kimball*, 4 Ind. 546, 58 Am. Dec. 638; *Lee v. Stone*, 5 Gill & J. 1, 23 Am. Dec. 589; *Haleys v. Williams*, 1 Leigh, 140, 19 Am. Dec. 743; *Michaux' Admr. v. Brown*, 10 Gratt. 612; *Roach v. Bennett*, 24 Miss. 98.

¹⁷⁹ *Lee v. Stone*, 5 Gill & J. 1, 23 Am. Dec. 589.

¹⁸⁰ *Chapron v. Cassaday*, 8 Humph. 661.

¹⁸¹ *Bank v. Morsell*, 1 McArthur, 155; *Julian v. Beal*, 26 Ind. 220; *Taylor v. Cornelius*, 60 Pa. St. 187. Compare *Blair v. Chamblin*, 89 Ill. 526.

¹⁸² *Walters v. Defenbaugh*, 90 Ill. 241.

obtained against the owner of an equity of redemption in mortgaged premises, after a decree of foreclosure but before a sale of the premises by the master, has an equitable lien upon the surplus moneys produced by the sale under the decree; but it is otherwise if the judgment was docketed subsequent to the sale.¹²³ Where, after making a contract for the sale of land, the vendor assigns his claim for the purchase-money and conveys the legal title to another as collateral security for a debt, such conveyance is in legal effect a mortgage, and the vendor has a right of redemption, or a resulting trust, which is bound by the lien of a judgment subsequently rendered against him.¹²⁴ But in a case where a court of chancery, upon a creditor's bill, had ordered the debtor to convey his realty to a receiver appointed by the court, it was held that a judgment recovered against the debtor after his conveyance to the receiver did not create a lien upon the lands.¹²⁵ And in general, where a debtor has conveyed an estate to trustees upon an *active* trust, so that there remains in him nothing more than a reversionary equitable interest, and afterwards a judgment is recovered against him, its lien will not, at common law, attach to such remaining interest of the debtor. But in equity the judgment-creditor is not without remedy. For, by filing a bill for that purpose, he may secure a *quasi* lien, which will give him an interest in any surplus which may remain from the estate after discharging the trusts and which would result to the grantor's benefit, paramount to that of the latter.¹²⁶ Thus, at common law, a judgment is not a lien upon real estate which, before the judgment was rendered, had been conveyed to trustees with a power of sale to secure the payment of debts of the grantor described in the deed of trust.¹²⁷ But in many of the states, under the statutes or settled precedents of the courts, before adverted to, which have changed the

¹²³ Sweet v. Jacocks, 6 Paige, 355, 31 Am. Dec. 252. See Sullivan v. Leckie, 60 Iowa, 326, 14 N. W. Rep. 355.

¹²⁴ Kimports v. Boynton, 120 Pa. St. 806, 14 Atl. Rep. 185.

¹²⁵ Chautauqua Co. Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442.

¹²⁶ Freedman's Savings Co. v. Earle,

110 U. S. 710, 4 Sup. Ct. Rep. 226; Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. Rep. 194; McFerran v. Davis, 70 Ga. 661; Schroeder v. Gurney, 10 Hun, 418; Chautauqua Co. Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442.

¹²⁷ Morsell v. Bank, 91 U. S. 857; Marlow v. Johnson, 31 Miss. 128.

ancient rule in regard to legal liens upon equitable estates, it is now held that the resulting trust in favor of the grantor in such a trust deed is property which will be bound by the lien of a subsequent judgment, and that such lien may be enforced by levy and sale of the land subject to the incumbrance of the trust deed.¹⁸⁸ After a sale, however, under the deed of trust, the debtor's right to redeem is removed from the land and is represented by the surplus in the hands of the trustee, against which such judgment-lien is continued and may be enforced in equity.¹⁸⁹ But if the judgment-creditor suffers a sale to be made under the deed of trust, without getting out execution on his judgment or otherwise giving the trustee actual notice of his claim, and the latter pays over the surplus in his hands, after satisfying the objects of the trust, to the grantor, the judgment-creditor cannot recover in an action against the trustee, for the latter is not bound to search the records for possible liens upon the fund.¹⁹⁰

§ 435. Judgment against Trustee.

A trustee cannot bind land held under the trust by a confession of judgment. The lien resulting from such judgment will attach to nothing but the personal interest, if any, which the trustee may have in the estate.¹⁹¹ But a trustee who, without the knowledge of his *cestui que trust*, purchases real estate, takes the title in his own name, and pays part of the consideration with trust funds in his hands and gives his own note and mortgage for the remainder, has an interest in the land upon which a judgment against him will attach as a lien.¹⁹²

§ 436. Land held under a Power.

If land is held by one under a power of appointment which he might exercise for his own benefit, it is generally held that he has

¹⁸⁸ Trimble v. Hunter (N. Car.), 10 S. E. Rep. 291; Hale v. Horne, 21 Gratt. 112; Pahlman v. Shumway, 24 Ill. 137; Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 854.

¹⁸⁹ Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 354.

¹⁹⁰ Warner v. Veitch, 2 Mo. App. 459; Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 854.

¹⁹¹ Hunt v. Townshend, 31 Md. 336.

¹⁹² Martin v. Baldwin, 30 Minn. 537, 16 N. W. Rep. 449.

such an interest in the estate as will be bound by the lien of a judgment against him.¹³³ In a case in New York, it appeared that certain lands were devised to trustees upon certain conditions, and with a further provision by which the *cestui que trust*, S., was empowered and authorized to convey and dispose, by his last will and testament, of all the said land, or any part thereof, and to limit and appoint the uses thereof in such manner as he might deem proper. In case S. should die without having made such will and appointment, then remainder in fee to his surviving issue. S. during his life conveyed several portions of the land to different grantees, and died without surviving issue. It was held that the power originally given to S. was a general power, of which he might have the exclusive benefit, and that, having exercised it, his interest in the property was to be deemed assets, upon which judgments recovered against him were equitable liens.¹³⁴

¹³³ *Brandies v. Cochrane*, 112 U. S. 344, 5 Sup. Ct. Rep. 194. In this case Matthews, J., said: "Prior to the enactment of 1 & 2 Vic., c. 110, it was settled in England that at law a judgment against the party having a power of appointment, with the estate vested in him until and in default of appointment, was defeated by the subsequent execution of the power in favor of a mortgagee. *Doe v. Jones*, 10 B. & C. 459; *Tunstall v. Trappes*, 8 Sim. 286, 300. And it was held to be immaterial that the purchaser had notice of the judgment; *Eaton v. Sanxter*, 6 Sim. 517; or that a portion of the purchase-money was set aside as an indemnity against it. *Skeeles v. Shearly*, 8 Sim. 153, s. c. on appeal, 3 Myl. & Cr. 112. In that case, Sir John Leach, the vice-chancellor, decided that the effect of the transmission of the estate by appointment was, that the appointee takes it in the same manner as if it had been limited to him by the deed under which the appointor takes in default of appointment, and, conse-

quently, free and disconnected from any interest which the appointor had in the tenements in default of appointment; that, as the appointee is in no sense the assignee of the appointor, he cannot be affected by judgments which affect only the estate and interest of the appointor, and, that being so, the circumstance of his having notice of such judgments is immaterial. The statute of 1 & 2 Vic., c. 110, altered the law in this respect, by making judgments an actual charge on the debtor's property, where he has, at the time the judgment is entered up, or at any time afterward, any disposing power over it, which he might, without the assent of any other person, exercise for his own benefit; so that it would continue to bind the property, notwithstanding any appointment. 2 Sugden on Powers, 7th Lond. Ed. 33; Burton on Real Property, 8th Lond. Ed. 283; *Hotham v. Somerville*, 9 Beav. 63."

¹³⁴ *Tallmadge v. Sill*, 21 Barb. 34.

§ 437. Judgment against Cestui Que Trust.

The equitable estate or interest of a *cestui que trust* in a dry or passive trust merely, is liable to execution and sale on a judgment recovered against him.¹⁹⁵ But in this country generally, in the absence of a statute changing the rule of the common law, a judgment is not a lien on the interest or estate of the beneficiary in an *active* trust, nor is there any remedy at law to enforce the payment of a judgment out of such interest or estate.¹⁹⁶ The creditor may indeed obtain relief upon a bill in equity, but the ground of the jurisdiction is not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution.¹⁹⁷ In an early Virginia case, it appeared that a deed of marriage settlement vested certain real estate

¹⁹⁵ Doe dem. McMullen v. Lank, 4 Houst. (Del.) 648.

¹⁹⁶ Flanagan v. Daws, 2 Houst. (Del.) 476; Beckett v. Dean, 57 Miss. 282.

¹⁹⁷ Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. Rep. 236. In delivering the opinion of the court in this case, Matthews, J., observed: "At common law executions upon judgments could not be levied upon estates merely equitable, because courts of law did not recognize any such titles and could not deal with them. They could not be levied upon the estate of the trustee when the judgment was against the *cestui que trust* for the same reason; and when the judgment was against the trustee, if his legal estate should be levied on, the execution-creditor could acquire no beneficial interest, and if the levy tended injuriously to affect the interest of the *cestui que trust*, the latter would be entitled to relief, by injunction or otherwise, in equity. Lewin on Trusts, 181, 186; 2 Spence, Eq. Jur. 39. But as courts of equity regarded the *cestui que trust* as the true and beneficial owner of the estate, to whose uses, according to the terms of the trust, the

legal title was made subservient, so in its eyes the estate of the *cestui que trust* came to be invested with the same incidents and qualities which in a court of law belonged to a legal estate, so far as consistent with the preservation and administration of the trust. This was by virtue of a principle of analogy, adopted because courts of equity were unwilling to interfere with the strict course of the law, except so far as was necessary to execute the just intentions of parties, and to prevent the forms of law from being made the means and instruments of wrong, injustice, and oppression. Thus equitable estates were held to be assignable and could be conveyed or devised, were subject to the rules of descent applicable to legal estates, to the tenancy by the curtesy, though not to dower, by an anomalous exception afterwards corrected by statute 3 & 4 Will. 4, c. 105; and were ordinarily governed by the rules of law which measure the duration of the enjoyment or regulate the devolution or transmission of estates; so that, in general, whatever would be the rule of law, if it were a legal estate, was ap-

in a trustee, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for the grantor's son. The annuitant being yet alive, a creditor of the son recovered judgment against him and brought a bill in equity to subject the son's equitable interest in the estate to the debt. It was held that such equitable interest could not be taken in execution at law, but that it was bound by the judgment in equity, and would be applied to the satisfaction of the debt; but as the annuitant was yet living and could not be compelled to take a gross sum in satisfaction of the annuity, and as the trustee was to hold the subject and pay the annuity out of the profits, equity ought not to direct an out and out sale of the debtor's interest subject to the annuity, but ought only to direct the application of the surplus of profits as they accrue, after paying the annuity, to the debt.¹⁹⁸ In Indiana, judgments are by statute liens on lands held in trust for the judgment debtor in their chronological

plied by the court of chancery by analogy to a trust estate. 1 Spence, Eq. Jur. 502. When the object of the bill is to obtain satisfaction of the judgment, by a sale of the equitable estate, it must be alleged that execution has been issued. This is not supposed to be necessary wholly on the ground of showing that the judgment-creditor has exhausted his remedy at law; for, if so, it would be necessary to show a return of the execution unsatisfied, which, however, is not essential. *Levin on Trusts*, 518. But the execution must be sued out; for if the estate sought to be subjected is a legal estate, and subject to be taken in execution, the ground of the jurisdiction in equity is merely to aid the legal right by removing obstacles in the way of its enforcement at law; *Jones v. Green*, 1 Wall. 380; and if the estate is equitable merely, and therefore not subject to be levied on by an execution at law, the judgment-creditor is bound, nevertheless, to put himself in the same position as if the estate were legal, because the action of the court converts the estate,

so as to make it subject to an execution, as if it were legal. The ground of the jurisdiction, therefore, is not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. And this it effects by a sale of the debtor's interest subject to prior incumbrances, or according to circumstances, of the whole estate, for distribution of the proceeds of sale among all the incumbrancers according to the order in which they may be entitled to participate. *Sharpe v. Earl of Scarborough*, 4 Ves. 588. It is to be noted, therefore, that the proceeding is one instituted by the judgment-creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dates from the filing of the bill."

¹⁹⁸ *Coutts v. Walker*, 2 Leigh, 268.

order, and a junior judgment obtains no priority by a decree in equity subjecting the lands to execution to satisfy it, where the plaintiff in the senior judgment is not a party.¹⁹⁹

§ 438. Interest of Vendor under Executory Contract.

Where the owner of land executes an agreement for the sale and conveyance of the same, he continues to be the legal owner so long as any part of the purchase-money conditioned in the contract remains unpaid, and his interest in the estate (which is the fee, subject to the equitable right of the vendee) is bound by the lien of a judgment duly docketed against him after the execution of the agreement, but before the execution of a deed; and on a sale under such judgment, the sheriff's vendee succeeds to the precise situation of the original vendor, and becomes entitled to require and receive payment of the balance of the purchase-money.²⁰⁰ Since, however, the lien of a judgment attaches only to the real and effective interest of the debtor, and is subject to all prior rights and equities, it can never operate to pass any greater or more extensive estate than the debtor himself could have transferred by his voluntary alienation. Hence, in the case supposed, the equitable right of the vendee to require a conveyance upon fulfilling his part of the contract is not cut out or set aside by the attaching of the judgment-lien. No matter into whose hands the legal title may pass by sale under execution, the vendee's claim remains the same. And the execution purchaser's interest is limited to the amount of purchase-money remaining due, after payment of which he must convey the legal title.²⁰¹ In this

¹⁹⁹ *Maxwell v. Vaught*, 96 Ind. 186.

²⁰⁰ *Minneapolis & St. Louis R. Co. v. Wilson*, 25 Minn. 382; *Young v. Devries*, 31 Gratt. 304; *Stewart v. Coder*, 11 Pa. St. 90; *Ware v. Jackson*, 19 Ga. 452; *Gaar v. Lockridge*, 9 Ind. 92; *McMullen v. Wenner*, 16 Serg. & R. 18, 16 Am. Dec. 548; *Fasholt v. Reed*, 16 Serg. & R. 266; *Lefferson v. Dallas*, 20 Ohio St. 68; *Filley v. Duncan*, 1 Nebr. 184, 98 Am. Dec. 387; *Uhl v. May*, 5 Nebr. 157; *Courtney v. Parker*, 16 Nebr. 311, 20 N.

W. Rep. 120 (s. c. 21 Nebr. 582, 33 N. W. Rep. 262); *Coolbaugh v. Roemer*, 30 Minn. 424, 15 N. W. Rep. 869; *Wells v. Baldwin*, 28 Minn. 408, 10 N. W. Rep. 427. *Per contra*, *Woodward v. Dean*, 46 Iowa, 499; *Hampson v. Edelen*, 3 Har. & J. 64, 8 Am. Dec. 530; *Georgetown v. Smith*, 4 Cranch C. C. 93; *Moore v. Byers*, 65 N. Car. 240; *Money v. Dorsey*, 7 Sm. & Mar. 15.

²⁰¹ *Filley v. Duncan*, 1 Nebr. 184, 98 Am. Dec. 387; *Moyer v. Hinman*, 17

divided condition of the title, judgments against vendor and vendee respectively, by their different creditors, bind the right of each in the land, whether legal or equitable.²⁰² Now it is evident that three cases may arise, according to the situation of the parties in reference to the payment of purchase-money at the date of the docketing of the judgment. For either the *whole* of the price may have been paid at that time, or *none* of it, or a *part* only. And these three cases, though presenting somewhat different features, are all governed by the same general principle. In the first place, if the whole of the purchase-money has been paid by the vendee at the time judgment is entered against the vendor, the lien will indeed attach upon the title still remaining in the latter (until the execution of the deed), but it could pass no real or beneficial interest in the land. The purchaser at sheriff's sale under the judgment would acquire nothing but the naked legal title, which he would hold in trust for the vendee, and which he must convey upon demand or at the time stipulated in the agreement.²⁰³ Similarly, if, by the agreement, the whole purchase-money is to be applied to the discharge of judgments prior to the agreement, and is so applied, a judgment subsequent to the agreement is not binding on the land.²⁰⁴ In the next place, although none of the purchase-money has been paid, yet the contract of sale will give the vendee an equitable interest in the estate which is not to be displaced by a subsequent judgment-lien against the vendor.²⁰⁵ The purchaser at an execution sale under the judgment would take

Barb. 187. "The equitable title of the vendee in a contract for the purchase of land, made in good faith and for a full and adequate consideration, is superior to the lien of a judgment-creditor whose judgment is recovered with notice, actual or constructive, of such contract. The judgment is a technical lien upon the land, subject to the contract, because the legal title rests in the vendor, but to be enforced only against the interest of the latter to the extent of the unpaid purchase-money. Upon the fulfillment of the contract by the parties thereto such lien ceases, and is as effectually cut out as if the deed had

been executed at the date of the contract. The judgment-debtor, having no lien, cannot afterwards apply to a court of equity to redeem from a prior mortgage." *Berryhill v. Potter* (Minn.), 44 N. W. Rep. 251.

²⁰² *Chahoon v. Hollenback*, 16 Serg. & R. 425, 16 Am. Dec. 587.

²⁰³ *Manly v. Hunt*, 1 Ohio, 237; *Lounsbury v. Purdy*, 11 Barb. 490; *Thomas v. Kennedy*, 24 Iowa, 397.

²⁰⁴ *Foster v. Foust*, 2 Serg. & R. 11.

²⁰⁵ *Hampson v. Edelen*, 2 Harr. & J. 64, 3 Am. Dec. 530; *Lane v. Ludlow*, 3 Paine, 591.

the legal title, but he would take it charged with the contract of sale, and could demand from the vendee no more than the stipulated price. In the third place, if a part of the purchase-money has been paid and the purchaser's note given for the balance, the lien of a judgment will still attach to the vendor's interest.²⁰⁶ Yet if the note given for such balance of price is passed away, before maturity, to a *bona fide* holder for value without notice, and is duly paid in his hands (no injunction preventing either of these acts being done), then the vendor has no longer any interest in the property, and the lien is gone.²⁰⁷ An exception to the rule is sometimes based upon the fact of possession in the vendee. Thus it has been held that land in the possession of a vendee under a valid contract to purchase cannot be sold as the property of the vendor under judgments which did not obtain liens until after the contract was made.²⁰⁸ At any rate, it appears to be well settled that the docketing of the judgment is not notice of the lien to the purchaser in possession, since, after he has taken his contract for the purchase, he is not bound to keep the run of the dockets; and payments subsequently made by him to the judgment-debtor, pursuant to the contract, without actual notice of the judgment, are valid as against its lien upon the land.²⁰⁹ If the premises are sold at sheriff's sale, on a judgment against the vendor entered before the date of the contract for a sum exceeding the amount the vendee was to pay, the latter is entitled to the surplus, in preference to a creditor of the vendor whose judgment was obtained after the date of the articles.²¹⁰

²⁰⁶ Bell v. McDuffie, 71 Ga. 264.

²⁰⁷ Riddle's Appeal (Pa.), 7 Atl. Rep. 282. In Moore v. Byers, 65 N. Car. 240, it was held that where a vendor of land receives part of the purchase-money and takes notes for the residue thereof, retaining the title until such notes shall be paid, and afterward a judgment is obtained against him, and he then dies, such judgment will not be a lien upon the land or the notes in the hands of

his executors, but the notes, when collected, will be assets for the payment of debts.

²⁰⁸ Adickes v. Lowry, 15 S. Car. 128; Elwell v. Hitchcock (Kans.), 21 Pac. Rep. 109.

²⁰⁹ Moyer v. Hinman, 13 N. Y. 180; Parks v. Jackson, 11 Wend. 442, 25 Am. Dec. 656.

²¹⁰ Siter's Appeal, 26 Pa. St. 178; Crouse's Appeal, 28 Pa. St. 139.

§ 439. Interest of Vendee under Executory Contract.

In regard to the interest of the *vendee* in an executory contract for the sale of lands, it must be remembered that his estate is equitable merely, the legal title remaining in the vendor, and consequently, at common law, it would not be subject to levy and sale on execution. But, as we have already seen,²¹¹ the common law rule as to judgment-liens on equitable interests has been modified in many of the states by statutes. Hence it is held, in several jurisdictions, that where a vendee of land has paid part of the purchase-money and holds a bond for title, but has not yet received a conveyance, he has acquired such an interest in the land as will be bound by the lien of a judgment against him.²¹² Of course an execution-purchaser of such interest would succeed to the precise situation of the judgment-debtor, and would be entitled to demand a deed from the original vendor upon complying with the terms of the original contract, but would take no higher or greater interest. On the other hand, in some few of the states, either in pursuance of the common law doctrine or by express provision of the statutes, it is held that the interest of a debtor in a contract for the purchase of lands cannot be sold on an execution against him, but the remedy of the judgment-creditor is by a suit in equity, after his execution at law has been returned unsatisfied.²¹³ It is also held that a conveyance with covenant of title made by a grantor who has a bond for a deed, and before he obtains the legal title, vests the legal title in the grantee *eo instanti* when the grantor obtains it, and there is no space of time in which the lien of a judgment obtained against such grantor, after the conveyance was made, can attach against the land.²¹⁴

²¹¹ *Supra*, § 438.

²¹² *Adams v. Harris*, 47 Miss. 144; *Foster's Appeal*, 3 Pa. St. 79; *Auwerter v. Mathiot*, 9 Serg. & R. 402; *Catlin v. Robinson*, 2 Watts, 373; *Ralston v. Field*, 32 Ga. 458; *Coombs v. Jordan*, 3 Bland, 284, 22 Am. Dec. 236; *Jackson v. Parker*, 9 Cow. 73; *Russell's Appeal*, 15 Pa. St. 319; *Pugh v. Good*, 3 Watts & S. 56, 37 Am. Dec. 584; *Waters's Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354;

Rand v. Garner, 75 Iowa, 311, 39 N. W. Rep. 515.

²¹³ *Ellsworth v. Cuyler*, 9 Paige, 418; *Boughton v. Bank of Orleans*, 2 Barb. Ch. 458; *Cooper v. Cutshall*, 1 Smith (Ind.), 128; *Gentry v. Allison*, 20 Ind. 481; *Roddy v. Elam*, 12 Rich. Eq. 343.

²¹⁴ *Lamprey v. Pike*, 28 Fed. Rep. 30. Compare *Van Camp v. Peerenboom*, 14 Wis. 65.

§ 440. Estates successively Conveyed.

A judgment-creditor cannot enforce his lien against the land of a subsequent purchaser so long as there are other lands of the debtor sufficient to satisfy the judgment.²¹⁵ And where lands subject to the lien of a judgment have been sold or incumbered by the owner at different times to different purchasers, there is no contribution among the successive purchasers, but the various tracts are liable to the satisfaction of the judgment in the inverse order of their alienation or incumbrance, the land last sold being first chargeable. In such case, the equities between the several purchasers are equal, yet the first purchaser, having the prior equity, is preferred.²¹⁶ A judgment-creditor, having by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable for the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable.²¹⁷

PART IV. DATE OF THE LIEN.

§ 441. Common Law Rule.

It was the rule of the common law (and this rule still obtains in some of the states) that the judgments of a court of record all relate back to the first day of the term and are considered as rendered on that day; and therefore their lien will attach to the debtor's realty from the beginning of the term, and will override a conveyance or mortgage made on the second or any succeeding day, although actually prior to the rendition of the judgment.²¹⁸ "This general

²¹⁵ James v. Hubbard, 1 Paige, 228.

²¹⁶ Savings Bank v. Cresswell, 100 U. S. 630; Relfe v. Bibb, 43 Ala. 519; McClung v. Beirne, 10 Leigh, 394, 34 Am. Dec. 789 (overruling Beverley v. Brooke, 2 Leigh, 425); Nailer v. Stanley, 10 Serg. & R. 450, 18 Am. Dec. 691; Clowes v. Dickenson, 5 Johns. Ch. 235; Rodgers v. McCluer, 4 Gratt. 81, 47 Am. Dec. 715; Bank of Hamburg v. How-

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ard, 1 Strobh. Eq. 173; James v. Hubbard, 1 Paige, 228; Merritt v. Richey, 97 Ind. 286; Day v. Patterson, 18 Ind. 114; Sidener v. White, 46 Ind. 588; Houston v. Houston, 67 Ind. 276; Jones v. Myrick, 8 Gratt. 179.

²¹⁷ Jones v. Myrick, 8 Gratt. 179.

²¹⁸ Johnson v. Smith, 2 Burr. 967; Bragner v. Langmead, 7 T. R. 20; Wag-horne v. Langmead, 1 Bos. & Pul. 571;

principle of the common law, like many others, is of such remote antiquity, and so long recognized without dispute, that the reasons and policy on which it was founded are, in a great degree, left to conjecture. One reason is assigned *arguendo* in the case of *Wynne v. Wynne* [1 Wils. 39] cited at the bar: that all the suitors whose cases are in such a situation as to entitle them to a judgment on the first day of the court ought to be in the same situation, and none to have any advantage over another, and as it is impossible for the court to give judgment in all such cases in one day, the only means of putting them upon a footing of equality is to refer all given in the same term to the first day, and give them the same effect as if they were really so. Another reason may have been to prevent debtors from withdrawing their property from the effect of judgments against them by alienations made after it was known that in the course of the term a judgment would pass. Whatever was the foundation of the rule, it operated uniformly as between different creditors, and the creditors of and purchasers from the debtor, without any exception, so far as I have been able to discover, until the case of purchasers was provided for by the statute 29 Car. 2, c. 3, § 14, which required that the true date of all judgments should be noted on the margin of the roll, and provided that they should bind, as to purchasers, only from such date. Before that statute, judgments confessed in vacation, under powers of attorney previously given for that purpose, related to the first day of the preceding term and overreached intermediate alienations. To remedy this mischief—of allowing judgments confessed under powers of attorney, when no previous suit was depending, to overreach intermediate alienations—was the chief object of the provision of the statute on that subject, as appears by its preamble. . . . But cases might occur in which judgments might be rendered during a term which could not by possibility relate to the

Fann v. Atkinson, Willes, 437; *Odeo v. Woodward*, 2 Ld. Raym. 766; *Robinson v. Tonge*, 3 P. Wms. 897; *Farley v. Lea*, 4 Dev. & Bat. 169, 33 Am. Dec. 680; *Foust v. Trice*, 8 Jones, 494; *Harding v. Spivey*, 8 Ired. 68; *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec.

642; *Colt v. Du Bois*, 7 Nebr. 891; *Mutual Assurance Soc. v. Stanard*, 4 Munf. 589; *Brockenbrough v. Brockenbrough*, 81 Gratt. 580; *Hooton v. Will*, 1 Dall. 450; *Sturgess v. Bank of Cleveland*, 3 McLean, 140.

first day; as where it appears that the plaintiff's case was not in a condition for a judgment on the first day, if the court had been prepared to hear it, and some further proceeding was indispensably necessary to mature his case for judgment. *Wynne v. Wynne*, 1 Wils. 42; *Swann v. Broome*, 3 Burr. 1596. . . . These are the only adjudged cases I have met with in which exceptions have been allowed to the general rule, and they are founded upon obviously good reasons, that might very well apply to all cases in which it appeared that the plaintiff's case could not be matured for judgment on the first day of the term."²¹⁹

§ 442. Exceptions to the Rule.

The principal exceptions to this rule of the common law have been already mentioned, in the decision quoted in the preceding section, and the authorities are generally in harmony with the conclusions there reached. Thus it is agreed that the rule does not apply to a judgment rendered during the term in a case which was in such a condition that the judgment could not have been given on the first day of the term.²²⁰ And at a very early day, it was held that, as between creditors, judgments by confession do not relate to the preceding term, but take priority according to the times of their entry.²²¹ In North Carolina it has been adjudged that a rule of court, that all judgments docketed during the term "shall be deemed to be docketed on the first day of the term," makes them relate to the first day even when the judge fails to open court on that day.²²² But on the other hand, in Virginia, it is considered that the lien dates only from the first day on which the court is actually in session.²²³ So, in Ohio, a mortgage handed in for record on the first day of the term of court, but before the court actually convened, was held to prevail against the lien of a judgment recovered at the same term. The court said: "At what time, then, does a term of court begin? It

²¹⁹ *Coutts v. Walker*, 2 Leigh, 268.

²²¹ *Welsh v. Murray*, 4 Dall. 320.

²²⁰ *Swann v. Broome*, 3 Burr. 1596;

²²² *Norwood v. Thorp*, 64 N. Car. 682.

Yates v. Robertson, 80 Va. 475; *With-*

²²³ *Skipwith v. Cunningham*, 8 Leigh,

ers v. Carter, 4 Gratt. 407, 50 Am. Dec. 78.

271, 31 Am. Dec. 642.

cannot be said that a term of court commences before the judges authorized to hold court have convened. There can be no term of court unless there is a court. If judgments attach only as liens from the beginning of the term of court, they attach from the time on the first day of the term at which the court was duly organized and opened."²²⁴ As against intervening purchasers, it may be regarded as settled that the lien of a subsequent judgment will not attach, justice forbidding that in such a case it should relate back to a time anterior to the conveyance.²²⁵ And in at least one state the common law rule

²²⁴ *Follett v. Hall*, 16 Ohio, 111, 47 Am. Dec. 365; *Holliday v. Franklin Bank*, 16 Ohio, 533.

²²⁵ *Morgan v. Sims*, 26 Ga. 283; *Pope v. Brandon*, 2 Stew. 401, 20 Am. Dec. 49. In the case last cited it was said: "The deed of assignment to the plaintiff bears date on the day when the term of this court commenced at which the judgment in favor of the Messrs. Brandon was rendered; but the judgment was not rendered until the first day of February, more than twenty days thereafter. From these facts it is argued for the defendants that the judgment relates retrospectively to the first day of the term, and from that period created a lien on the real property of the bank in favor of the Messrs. Brandon, which it was not competent for the bank to divest by its transfer on that or any succeeding day. It is a well settled rule of the common law that a judgment operates to restrain the control of the debtor over his real estate so as to defeat its satisfaction; but this rule, it is believed, does not give to a judgment a retrospective operation against a *bona fide* assignee. The reason of the rule is founded upon the supposition that the proceedings of a court of record are of public notoriety, and that he who purchases real estate after judgment purchases with a knowledge of its existence. To give effect to purchases under such circumstances would be a fraud upon the judgment-

creditor. The reason, it is apparent, will not extend to give judgments a lien from a period of time anterior to their rendition, for until then the purchaser cannot be advised of its existence, and consequently cannot be held to have purchased in fraud of a judgment-creditor. *Cessante ratio cessat ipsa lex*. The argument of the retrospective influence of judgments is predicated upon the idea that as the whole term is considered in law as but one day, everything done during the term must relate to its commencement. This conclusion does not necessarily follow. It is true that the term of a court is for some purposes but one day; as a plea put in on the last day of the term is a plea of the first day of the term, and upon this idea of continued sitting of the court, judges may alter and amend their judgments in the same term. This fiction, like all others which the law acknowledges, is designed to advance, but never to defeat, the purposes of justice. *In fictions juris semper consistit æquitas*. To give a retroactive effect to a judgment would be rather subversive than promotive of justice, as a purchaser could not be constructively advised of it, until it had an actual existence. So particular have the courts been in adjusting the question of priority between the fair purchaser and the judgment-creditor, where the deed of sale and the judgment bear date of the same day, that

has never been accepted at all. "The uniform, uninterrupted practice in Pennsylvania for more than a century [that is, a century prior to 1805] has been to consider the binding effect of judgments upon lands to take place only from the actual entry of the judgments. Judgments thus entered have never been supposed liable to be affected by fictions or relations. This custom has been used and approved since the first settlement of the province and conduces to safety and security. As between conflicting judgment-creditors, the well known rule applied to the truth of the fact as to the entry of the judgments, *qui prior est tempore potior est jure*, must govern."²²⁶

§ 443. Present Statutory Rules.

That the rule of the common law, fixing the date of the lien of a judgment by relation to the first day of the term, has been abolished in a great majority of the states, and has been much modified in others, will appear from the following synopsis of the present statutes on the subject:

In Kansas, Nebraska, Ohio, and Wyoming, the lien attaches "from the first day of the term at which the judgment is rendered; but judgments by confession and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which such judgment was rendered."²²⁷

In Virginia and West Virginia, the lien attaches "at or after the date of such judgment, or, if it was rendered in court, at or after the commencement of the term at which it was so rendered."²²⁸

In seven states and territories (Arkansas, Indiana, Iowa, Missouri,

inquiries are allowed to ascertain the precise period of the execution of the one and the rendition of the other; *Ex parte Stagg*, 1 N. & McC. 405. Having shown that a judgment can only operate prospectively against a fair purchaser, we are brought to the third and last point of inquiry," etc. But the contrary was undoubtedly the rule of the common law until the enactment of stat. 29 Car. 2, c. 3, § 14.

²²⁶ *Welch v. Murray*, 4 Yeates, 197.

²²⁷ Civil Code Kans. (Taylor), § 419; Code Civil Proc. Nebr. (1885), § 477; 1 Rev. St. Ohio (1890), § 5375; Rev. St. Wyo. (1887), § 2722. See as to Ohio, *Jeffrey v. Moran*, 101 U. S. 285; *Urbana Bank v. Baldwin*, 8 Ohio, 65.

²²⁸ Code of Va. (1887), § 8567; Code of W. Va. (1887), p. 863, § 5. See *Yates v. Robertson*, 80 Va. 475.

New Mexico, North Carolina, and Wisconsin), the lien commences on the day of the "rendition" of the judgment.²²⁹

In nine states and territories (Colorado, Dakota, California, Idaho, Montana, Minnesota, New York, Oregon, and Utah), the lien of a judgment commences from the date on which it is "docketed."²³⁰

In Alabama and Texas, it begins from the date on which the judgment is "registered."²³¹

In Arizona, from the day when the judgment is "recorded and indexed."²³²

In New Jersey, from the date of its "actual entry."²³³

In Florida, the lien commences when the judgment is "entered and pronounced in any court."²³⁴

In Pennsylvania, the lien attaches from the date of entry or revival of the judgment.²³⁵

In Georgia and Illinois, judgments rendered at the same term are all of equal date.²³⁶

In Maine, New Hampshire, and Vermont a judgment is regarded as having been rendered on the last day of the term unless it appears by the record to have been rendered on a different day.²³⁷

In Maryland, according to the decisions, "a judgment has relation to the time when it is entered up. It will not affect any *bona fide*

²²⁹ Dig. Stats. Ark. 1884, p. 801, § 8918; Code Civil Proc. Ind. § 606; 2 McClain's Code of Iowa (1888), p. 1177, § 4089; 1 Rev. St. Mo. (1879), p. 461, § 2781; Code Civil Proc. New Mex. § 2138; Code of N. Car. § 485; Rev. St. Wis. (1878), § 2902. See *Friar v. Ray*, 5 Mo. 511.

²³⁰ Civil Code Colorado, § 211; Code Civil Proc. Dak. § 800; Code Civil Proc. Cal. § 671; Rev. St. Idaho (1887), § 4457; Comp. St. Mont. (1887), p. 139, § 807; Genl. St. Minn. (1878), c. 66, § 277; Code Civil Proc. N. Y. § 1250; Hill's An. Laws of Oreg. p. 842; 2 Comp. Laws of Utah (1888), p. 800, § 3414. See *Stannis v. Nicholson*, 2 Oreg. 832.

²³¹ Ala. Act Feb. 28, 1887, § 1; Paschal's Tex. Dig. art. 3963. See *Quinn v. Wiswall*, 7 Ala. 645; Ala. C. & N. Co.

v. State, 54 Ala. 36; *Ex parte Dillard*, 68 Ala. 594; *Powe v. McLeod*, 76 Ala. 418.

²³² Rev. St. Arizona, § 2252.

²³³ Revision of New Jersey, p. 530, § 2.

²³⁴ McClellan's Dig. Laws Fla. p. 618, § 1.

²³⁵ 1 Bright. Purd. Pa. Dig. p. 946, § 5.

²³⁶ Code of Ga. (1882), § 3578; Rev. St. Ill. (1889), p. 840, § 1. See *Morgan v. Sims*, 26 Ga. 233; *Ryhiner v. Frank*, 105 Ill. 326.

²³⁷ *Chase v. Gilman*, 15 Me. 64; *Goodall v. Harris*, 20 N. H. 368; *Strafford Bank v. Cornell*, 2 N. H. 324; *Bradish v. State*, 35 Vt. 452; *Huntington v. Charlotte*, 15 Vt. 46.

conveyance made for value before that time, for it only attaches upon that which is then or afterwards becomes the property of the debtor."²²⁸ And in Tennessee, also, the lien commences from the actual date of the judgment and has no relation back to the beginning of the term.²²⁹

§ 444. Cases in which Lien relates back.

There are certain cases in which, by an exception to the now commonly accepted rule, the lien may relate back to a time anterior to the actual date of the judgment. Thus, in a proceeding *in rem* by attachment on land, the lien of the judgment of condemnation is a specific lien on the property condemned, which relates back to the time when the attachment was laid, and ripens into a perfect legal title in the purchaser under the execution.²³⁰ So, upon the declaration of the forfeiture of a writ of error bond, by a judgment affirming the judgment below, the lien which springs out of it relates back to the time of its execution and binds the land of the surety in the county where the original judgment was rendered from that time.²³¹ Again, "a judgment entered on the day on which the defendant's land is sold by the sheriff on an execution, is a lien on his land at the time of the sale, although entered at a later hour of the day than the sale, and is entitled to share in the proceeds."²³² But on the other hand, a judgment for damages for detention of dower takes date, as a lien, from the time of its entry, and not from the time when the right to dower accrued.²³³ So the lien of a judgment on which execution is stayed dates not from the rendition of the judgment, but from the time when execution may be sued out.²³⁴ And in general, except under the most exceptional circumstances, the lien cannot be considered as relating back to the time of the accrual of the cause of action.²³⁵

²²⁸ Dyson v. Simmons, 48 Md. 207, 215; Anderson v. Tuck, 88 Md. 235.

²²⁹ Murfree v. Carmack, 4 Yerg. 270, 36 Am. Dec. 282.

²³⁰ Cockey v. Milne, 16 Md. 200.

²³¹ Berry v. Shuler, 25 Tex. 140; Shane v. Francis, 80 Ind. 92.

²³² Small's Appeal, 24 Pa. St. 398.

²³³ Evans v. Evans, 1 Phila. 113.

²³⁴ United States Bank v. Winston's Exr., 2 Brock. 252.

²³⁵ White v. Railroad Co., 52 Iowa, 97, 2 N. W. Rep. 1016; Lentz v. Lamplugh, 12 Pa. St. 344.

PART V. PRIORITY AND PRECEDENCE OF JUDGMENT-LIENS.

§ 445. Lien is Subject to Prior Equities.

The attaching of a judgment-lien upon land does not disturb the condition of the title with respect to existing equities, interests, or other liens. The new lien must simply take its place in the ranks. It is therefore subject to all the equities which were held against the land in the hands of the judgment-debtor at the time the judgment was rendered. And if called upon in a proper case, the courts of chancery are always ready to protect the rights of those who hold such equities, as against the legal lien of the judgment, and to confine the efficacy of the latter to the actual interest, or residuary estate (so to speak) of the debtor, after due recognition is given to the outstanding equities in their proper order.²⁴⁶ Thus a lien by contract upon real property, prior in time to the judgment, is paramount to the judgment-lien, though the judgment-creditor has no notice or knowledge of such prior lien by contract, and a purchaser at execution-sale under the judgment, with notice, actual or constructive, acquires no greater interest than the judgment-debtor had.²⁴⁷ In a case where a person who had contracted for the purchase of land obtained a deed for the same from the vendor under an agreement that it should not be used until the balance of the purchase-money then due was paid, it was held that this was a valid delivery of the deed to pass the legal title to the land to the vendee subject to the vendor's equitable lien for the unpaid purchase-money, and that such balance of price must be paid in preference to a judgment

²⁴⁶ *Finch v. Earl of Winchelsea*, 1 P. Wms. 277; *Brown v. Pierce*, 7 Wall. 205; *Sweet v. Jacobs*, 6 Paige, 355, 31 Am. Dec. 252; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305; *Ellis v. Tousley*, 1 Paige, 280; *Coombs v. Jordan*, 8 Bland, 284, 22 Am. Dec. 286; *Floyd v. Harding*, 28 Gratt. 401; *Walke v. Moody*, 65 N. Car. 599; *Coster's Exr. v. Bank of Georgia*, 24 Ala. 37, 64;

Larhet v. Hogan, 1 La. Ann. 330; *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608; *Frazer v. Thatcher*, 49 Tex. 26; *Wharton v. Wilson*, 60 Ind. 591; *Foltz v. Wert*, 103 Ind. 404, 2 N. E. Rep. 950; *Wells v. Benton*, 108 Ind. 585, 8 N. E. Rep. 444; *Goodell v. Blumer*, 41 Wis. 436.

²⁴⁷ *Doswell v. Adler*, 28 Ark. 83.

against the vendee which was a lien upon his estate in the land.³⁴⁸ A specific equitable lien upon land is entitled to a preference over a subsequent legal lien by judgment. But an equitable lien created to secure an antecedent indebtedness (for example, an agreement by a debtor to execute a mortgage to his creditor) is not entitled to a preference over a lien by judgment where both attach upon the land at the same time.³⁴⁹ Nor are judgment-creditors protected against trusts of which they have no notice, or allowed in equity to hold against the *cestui que trust*.³⁵⁰ An opinion counter to the general rule has sometimes been expressed in Pennsylvania. In a case in that state it appeared that A. advanced money to B. and took his judgment therefor, on the faith of an entry of satisfaction of a prior judgment; but upon the application of the equitable assignee of the prior judgment, the court struck off the entry of satisfaction. In the distribution of the proceeds of a sheriff's sale of B.'s real estate, it was held that A. was entitled to be paid in full, before the prior judgment could participate in the distribution; for A. was not required to look into equities to which he was not a party and of which he had no knowledge.³⁵¹

³⁴⁸ Arnold v. Patrick, 6 Paige, 810. In a later case in the same state it was said: "The question as to the extent to which a secret, equitable, and unrecorded lien of a vendor, for unpaid purchase-money of lands sold and conveyed by him, exists as against a judgment-creditor after the lien is recorded, or other parties than the vendee, must depend upon the facts and circumstances of the particular case. Such lien cannot exist generally against purchasers in good faith, under a conveyance of the legal estate, without notice, when the purchase-money has been paid. The general rule stated applies more particularly to cases where it is sought to enforce an equitable lien for the purchase-money, which has

never been put on record as against subsequent mortgagees or purchasers in good faith and for a valuable consideration. In such a case it is too clear to admit of any question that the rights of the person claiming such equitable lien should yield, by reason of his neglect, to the claims of subsequent incumbrancers or purchasers, and it may well be asserted that a prior claimant for the purchase-money, under such circumstances, has, by his silence and neglect, yielded his right." Spring v. Short, 90 N. Y. 538. See Tallman v. Farley, 1 Barb. 280.

³⁴⁹ Dwight v. Newell, 8 N. Y. 185.

³⁵⁰ Shryock v. Waggoner, 28 Pa. St. 430.

³⁵¹ Harner's Appeal, 94 Pa. St. 439.

§ 446. As against Prior Unrecorded Conveyance.

In many of the states there are statutes which make a deed or mortgage invalid unless it is duly recorded. And where the law stands thus, it is generally held that the lien of a judgment is to be preferred to a conveyance executed before the rendition of the judgment but not recorded until afterwards, *provided* that the judgment-creditor has no actual notice of the existence of such prior conveyance.²²² "As a general proposition," says the court in Texas, "a judgment lien only attaches to the actual interest of the debtor in the land; but on account of our registration laws, ordinarily, if the judgment-lien attaches before the creditor has notice of the existence of the unrecorded deed, then such deed is subordinated to the lien, and subsequent notice of the existence of the deed would work no change in the rights of the parties."²²³ But this applies only to a creditor who is not informed as to the prior deed or mortgage. If, at the time of docketing the judgment, he has notice of the unrecorded conveyance, the judgment-lien will take second place.²²⁴ And this notice may very well be constructive, or inferred from circumstances. Thus, where land is conveyed by a deed which is not registered, but the purchaser enters and holds under the deed for several years, after which a stranger enters on the possession and holds without any connection with the title, these facts are sufficient notice to prevent a lien from attaching to the land by a judgment obtained against the vendor of the land some years after his sale and conveyance.²²⁵ But although an unrecorded deed to lands takes precedence of a judgment as against the judgment-creditor, if, before the recovery of his judgment,

²²² Reed v. Austin, 9 Mo. 722, 45 Am. Dec. 386; Frothingham v. Stacker, 11 Mo. 77; McClure v. Thistle, 2 Gratt. 182; Young v. Devries, 81 Gratt. 304; Lash v. Hardick, 5 Dill. 505; Mayham v. Coombs, 14 Ohio, 428; Cavanaugh v. Peterson, 47 Tex. 198; Firebaugh v. Ward, 51 Tex. 409; Guiteau v. Wisely, 47 Ill. 433; Hawkins v. Files, 51 Ark. 417, 11 S. W. Rep. 681; Cleveland v.

Shannon (Ark.), 12 S. W. Rep. 497; Anderson v. Nagle, 12 W. Va. 98; Andrews v. Matthews, 59 Ga. 466; Dutton v. McReynolds, 81 Minn. 66, 16 N. W. Rep. 468; Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co., 58 Miss. 846, 38 Am. Rep. 848.

²²³ Calvert v. Roche, 59 Tex. 468.

²²⁴ Lamberton v. Bank, 24 Minn. 281.

²²⁵ Powell v. Allred, 11 Ala. 318.

he has actual notice of the conveyance by the debtor, yet the *assignee* of such judgment, who buys without notice that his assignor had notice before the rendition of the judgment of the unrecorded conveyance, is not affected by the notice to his assignor.²⁵⁶ And so, while a mortgage imperfectly recorded is ineffectual as a lien against subsequent judgment-creditors, yet if there be a second mortgage, between the first and the judgments in point of time, to which the proceeds of the mortgaged premises when sold would be paid, and this mortgagee had actual notice of the first mortgage when he took his own, the first mortgage is good as to him, and therefore is entitled to have the money appropriated to it.²⁵⁷

But in a number of states the statutes are such that a deed or mortgage is valid without being recorded. And in these jurisdictions the courts adhere to the rule that a judgment is a lien only upon the actual interest of the debtor, and consequently that the judgment acquires no lien at all if the land has been previously conveyed away, although the deed is not recorded, or that its lien is subordinated to that of a prior unrecorded mortgage.²⁵⁸ But if there be a sale made under such subsequent judgment to a third person, for value paid and without notice, the rights of such purchaser will take priority over those of the grantee in an unrecorded deed or mortgage.²⁵⁹

§ 447. Precedence of Purchase-Money Mortgage.

A mortgage or trust-deed given to secure the balance of purchase-money on a tract of land, executed simultaneously with the conveyance of the legal title and duly recorded, has priority of lien over judgments obtained against the purchaser anterior to the conveyance.²⁶⁰ In such case, the purchaser acquires only a temporary

²⁵⁶ *Duke v. Clark*, 58 Miss. 465.

²⁵⁷ *Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania*, 7 Watts. & S. 835, 42 Am. Dec. 240.

²⁵⁸ *Sparks v. Bank*, 7 Blackf. 469; *Schroeder v. Gurney*, 73 N. Y. 430; *Mellon's Appeal*, 32 Pa. St. 121; *Larrimer's Appeal*, 23 Pa. St. 41; *Norton v. Williams*, 9 Iowa, 528; *Bell v. Evans*, 10

Iowa, 353; *Wilcoxson v. Miller*, 49 Cal. 198; *Hampton v. Levy*, 1 McCord Ch. 107; *Farley v. McAllister*, 39 Tex. 603.

²⁵⁹ *Evans v. McGlasson*, 18 Iowa, 150; *Paine's Lessee v. Mooreland*, 15 Ohio, 435.

²⁶⁰ *Cake's Appeal*, 23 Pa. St. 136, 63 Am. Dec. 328; *Parsons v. Hoyt*, 24 Iowa, 154; *Scott v. Warren*, 21 Ga. 408; *Straus*

seisin, and not such an interest in the land as becomes subject to the lien of a judgment against him in preference to the mortgage, as the deed and the mortgage are but parts of the same transaction.²⁶¹ And where the purchaser, at the same time he receives the conveyance, executes a mortgage to a *third person*, who advances the purchase-money for him, such mortgage is entitled to the same preference over a prior judgment as it would have had if it had been executed to the vendor himself.²⁶² Thus if A. executes a deed of land to B., and B. mortgages it to C., and also conveys it back to A., the two deeds and mortgage being executed as parts of one transaction solely to enable B. to procure a loan from C., no lien of a judgment held by D. against B. at the time thereof can attach to B.'s interest, and no execution afterward issued can be levied thereon.²⁶³ But where a judgment debtor acquires title to land after the judgment has been obtained, and immediately executes a mortgage thereof to a third person to secure him against some contingent liability, and *not* to secure the purchase-money of the land, the judgment will be the elder lien.²⁶⁴

§ 448. Priority of Government Claims.

It is provided, by section 346 of the Revised Statutes of the United States, that "whenever any person indebted to the United States is insolvent . . . the debts due the United States shall be first satisfied," and this priority is declared to extend to cases in which an act of bankruptcy is committed. Section 5101 provides that in the order for a dividend in a bankruptcy proceeding, after paying certain costs and expenses, "debts due the United States shall have priority." It may now be regarded as settled that the priority of the United States, given by these statutes, "does not overrule any liens

v. Bodecker (Va.), 10 S. E. Rep. 570; Cowardin v. Anderson, 78 Va. 88; Summers v. Dame, 81 Gratt. 791; Clark v. Munroe, 14 Mass. 351; Clark v. Butler, 32 N. J. Eq. 634, Curtis v. Root, 20 Ill. 58; compare Roane v. Baker (Ill.), 2 N. E. Rep. 501.

²⁶¹ Cowardin v. Anderson, 78 Va. 88.

²⁶² Haywood v. Nooney, 8 Barb. 643; Cowardin v. Anderson, 78 Va. 88; Clark v. Munroe, 14 Mass. 351; Kaiser v. Lembeck, 55 Iowa, 244, 7 N. W. Rep. 519.

²⁶³ Ransom v. Sargent, 22 Kans. 516.

²⁶⁴ Root v. Curtis, 38 Ill. 192.

upon the debtor's property which existed before the event occurred which gives the statutory priority; that is, before the insolvency."²⁶⁵ In Pennsylvania, under the act of February 28, 1866, the lien of taxes due to a city upon real estate is prior to that of a judgment obtained before the taxes were levied.²⁶⁶ In another state it is held that a judgment obtained against one in his lifetime has the preference over a debt or specialty passed to the state after such judgment, in the settlement of the estate of the decedent.²⁶⁷

§ 449. Priority by Date of Entry.

By reference to a preceding section it will be seen that in at least seventeen states and territories, by the statutes, the lien of a judgment commences from the day when it is docketed or registered or the date of its actual entry. And it is a general rule that, as between all judgment liens entered at different times, that which was first docketed has the preference.²⁶⁸ And on similar principles, where several judgment creditors resort to equity to subject an equitable interest of their debtor in land to the satisfaction of their judgments, they will be entitled to satisfaction according to the priority of their judgments in point of time.²⁶⁹ As between a judgment at law and a decree in equity, where the law requires both to be enrolled, the same rule obtains; and where a decree is obtained prior to a judgment against the same defendant, but the judgment is enrolled before the decree, the judgment takes the precedence.²⁷⁰ As between a judgment in another county and a mortgage, priority of lien is determined by priority of registration in the county where the land is situated.²⁷¹ A judgment for a firm debt has no priority over a judgment pre-

²⁶⁵ *United States v. Lewis*, 18 N. B. R. 88; *Cottrell v. Pierson*, 12 Fed. Rep. 805; *Hoppock v. Shober*, 69 N. Car. 153; *Conard v. Ins. Co.*, 1 Pet. 438; *Brent v. Bank*, 10 Pet. 596. In so far as the early case of *Thelusson v. Smith*, 2 Wheat. 896, may have asserted a different doctrine, it must be regarded as overruled by the later decisions of the supreme court of the United States above cited.

²⁶⁶ *Eaton's Appeal*, 83 Pa. St. 152.

²⁶⁷ *Hollingsworth v. Patten*, 3 Har. & McH. 125.

²⁶⁸ *Johnson v. Mitchell*, 17 Ga. 593; *Purveyor v. Taylor*, 12 Gratt. 401.

²⁶⁹ *Haleys v. Williams*, 1 Leigh, 140, 19 Am. Dec. 743.

²⁷⁰ *McKee v. Gayle*, 42 Miss. 676.

²⁷¹ *Firebaugh v. Ward*, 51 Tex. 409.

viously obtained against the several members of the firm on their individual liabilities, and the purchaser at a sale under execution to enforce the latter judgment takes a good title as against the purchaser at a sale under the former.²⁷³ So the lien of a judgment rendered pending a petition for divorce, and before the rendition of a decree for alimony, is superior to that of the decree, where the petition does not allege a claim to any specific tract of land, or pray for alimony by way of annuity upon the husband's real estate generally.²⁷³ The same rule which applies as between two judgments also governs the case of a conflict between a judgment and a conveyance, where the laws require the latter to be registered. Thus, according to a late case, under a statute providing that judgments shall be entered by the clerk on the judgment docket of the court, and, if docketed within ten days from the end of the term, shall be a lien on the debtor's real estate from the beginning of the term, a deed executed in November is superior to a judgment rendered in the preceding August and docketed in the following July.²⁷⁴ And where a judgment is a prior lien to a mortgage, a purchaser under the judgment will stand in the place of the judgment-creditor and take precedence of the mortgage, although his title under the sheriff's sale be defective.²⁷⁵ It remains to notice certain exceptional cases wherein a departure from the foregoing rule has been sanctioned. These are mostly governed by considerations of justice and equity. Thus, where money is made under several executions issued on different judgments, that issuing upon the elder judgment is not entitled to priority of satisfaction if it has been delayed or suspended in fraud of the rights of other creditors.²⁷⁶ So where, upon promissory notes given for the purchase-money of land and secured by an express lien or equitable mortgage in the deed of conveyance, several judgments are rendered,

²⁷³ *Davis v. Delaware & Hudson Canal Co.*, 109 N. Y. 47, 15 N. E. Rep. 878. The law is the same also in the converse case; subsequent judgments against the individual members of the firm are postponed to a prior judgment against the firm. *Stevens v. Bank of Central New York*, 81 Barb. 290.

²⁷³ *Hamlin v. Bevans*, 7 Ohio, (pt. 1,) 161, 28 Am. Dec. 625.

²⁷⁴ *Holman v. Miller* (N. Car.), 9 S. E. Rep. 429.

²⁷⁵ *Wait's Exr. v. Savage* (N. J.), 15 Atl. Rep. 225.

²⁷⁶ *Bank v. Henderson*, 5 How. (Miss.) 292.

in favor of two different holders of such notes, against the maker, each of the judgments is entitled to share in the proceeds of the land, even though one may have been recovered and enrolled before the other.²⁷⁷ In a case in West Virginia, where two judgments had been recovered, one in 1868 and the other in 1869, and the one last recovered was docketed in 1870, while the one first obtained was docketed in 1871, but both were docketed before a contract in writing or deed to a purchaser for valuable consideration without notice was recorded, it was held that the judgment *first* recovered, though last docketed, had priority.²⁷⁸

§ 450. Two Judgments entered the Same Day.

The rule obtaining in a majority of the states is that, as between judgments entered of record on the same day, there is no priority, for the law cannot in this case regard fractional parts of a day; hence all such judgments create equal liens, and the issuing of an execution on any one of them does not affect the others, but, the land of the defendant being sold, a *pro rata* distribution of the proceeds must be made in satisfaction of the judgments.²⁷⁹ In North Carolina, however (and in a few sporadic cases elsewhere), it is held that where several judgments are docketed on the same day, the court will inquire into the fractional part of a day, in order to ascertain which was the first entered and give it the preference.²⁸⁰ In New York, and some other states, the doctrine is that where two judgments in favor of different plaintiffs against the same defendant are filed and docketed on the same day, neither has the preference as a *lien*; but if one of the creditors first takes out an execution and delivers it to the sheriff before the other creditor takes out his execu-

²⁷⁷ Aaron v. Warner, 62 Miss. 370.

²⁷⁸ Anderson v. Nagle, 12 W. Va. 98.

²⁷⁹ Claason's Appeal, 22 Pa. St. 359; Metzler v. Kilgore, 8 Pen. & W. 245, 23 Am. Dec. 76; Ladley v. Creighton, 70 Pa. St. 490; Mechanics' Bank v. Gorman, 8 Watts & S. 304; Clawson v. Eichbaum, 2 Grant (Pa.), 130; Emerick v. Garwood, 1 Browne (Pa.), 20; Rockhill

v. Hanna, 4 McLean, 554; McLean v. Rockey, 8 McLean, 235; Bruce v. Vogel, 33 Mo. 100; Janney v. Stephen, 2 Pat. & H. 11; Burney v. Boyett, 1 How. (Miss.) 39.

²⁸⁰ Bates v. Hinsdale, 65 N. Car. 423; Lemon v. Staats, 1 Cow. 592; Biggam v. Merritt, Walker (Miss.) 430, 12 Am. Dec. 576.

tion, and the lands of the debtor are taken and sold, a priority will be gained by the vigilant creditor, and his execution must be first satisfied.²³¹ In Mississippi, the question of the priority of the rendition of two judgments in the same courts is to be determined by the minutes of the court, and it is not admissible to show by evidence *aliunde* that the one last entered was in fact first rendered.²³²

§ 451. Judgment and Conveyance entered the Same Day.

The doctrine has sometimes been expressed that a judgment entered on a given day, no matter at what hour, is a lien during the whole of that day, and therefore has preference over a mortgage or other conveyance recorded at any hour of the same day.²³³ But this view is generally rejected, as too refined and artificial, although, in some states, a distinction is still made between a deed and a mortgage, as to their respective rank as against a judgment docketed on the same day. It may now be regarded as well settled that, in a contest between a *vendee* of the land and a judgment-creditor whose judgment was docketed on the same day with the conveyance, the fractions of the day must be taken into consideration, the precise time of each ascertained, and the rule applied "first in order first in right."²³⁴ In the language of Chief Justice Gibson of Pennsylvania, "the argument that a judgment, whose date in contemplation of law covers the whole day, is necessarily anterior to a conveyance at an intermediate point of the same day, is too subtle to be solid. The conclusion attempted would not be borne out by the most fanciful effect of the legal fiction; for it might be possible to deliver a conveyance so exactly at the stroke of twelve as to leave no room for an intervening lapse of any appreciable portion of time. But justice is not to be

²³¹ *Waterman v. Haskin*, 11 Johns. 228; *Adams v. Dyer*, 8 Johns. 847, 5 Am. Dec. 844; *Lippencott v. Wilson*, 40 Iowa, 425; *Tilford v. Burnham*, 7 Dana, 109; *Gay v. Rainey*, 89 Ill. 221, 81 Am. Rep. 76.

²³² *Johnson v. Edde*, 58 Miss. 664.

²³³ *Hollingsworth v. Thompson*, 5 Har-

ringt. 432. See *Boyer's Estate*, 51 Pa. St. 432, 91 Am. Dec. 129.

²³⁴ *Clawson v. Eichbaum*, 2 Grant (Pa.), 180; *Mechanics' Bank v. Gorman*, 8 Watts & S. 804; *Small's Appeal*, 24 Pa. St. 398; *Ladley v. Creighton*, 70 Pa. St. 490; *Murfree v. Carmack*, 4 Yerg. 270, 26 Am. Dec. 282.

dispensed on principles so artificial where it can be avoided. When judgments bear the same date, they must necessarily come in together; but between a judgment and a conveyance, actual priority must be shown like any other fact."²⁸⁵ The last statement in the foregoing quotation,—that the precise time of entry of the judgment may be shown by less than record proof,—though reasonable and well calculated to promote justice, is not everywhere accepted. In at least one state, the courts refuse to hear evidence outside the record, on the question of the actual priority of the judgment and the deed, and award the precedence to the lien of the former unless it actually appears of record to have been subsequent to the conveyance.²⁸⁶ In a contest of this sort, it is held, the lien of the judgment takes effect from its rendition by the judge, and not from the time of signing the minutes of the court.²⁸⁷

In a contest for priority between a *mortgagee* of the land and a judgment-creditor whose judgment was docketed on the same day with the mortgage, it seems reasonable to accord to the former the same rights and privileges that are granted to a purchaser. And in Tennessee this is the accepted doctrine. The hour of entry may be inquired into, and actual priority will give legal precedence.²⁸⁸ But in Pennsylvania the rule is otherwise. Evidence is not admissible of the hour at which the judgment was rendered; if the judgment-lien and the mortgage-lien are created on the same day, they are entitled to equality of distribution.²⁸⁹ "The fractional division of a day cannot be noticed in determining the time when the lien of a judgment attached. If it could be, there is nothing on the record of this judgment to show whether it was entered at an earlier or a later moment than the mortgage. The rule in such cases is to treat the two liens as commencing simultaneously, and if the land of the

²⁸⁵ *Mechanics' Bank v. Gorman*, 8 Watts & S. 804; *Hoppock's Ex'rs v. Ramsey*, 28 N. J. Eq. 418.

²⁸⁶ *Murfree v. Carmack*, 4 Yerg. 270, 26 Am. Dec. 232; *Berry v. Clements*, 9 Humph. 312.

²⁸⁷ *Clark v. Duke*, 59 Miss. 575.

²⁸⁸ *Murfree v. Carmack*, 4 Yerg. 270, 26 Am. Dec. 232; *Berry v. Clements*, 9 Humph. 312.

²⁸⁹ *Clawson v. Eichbaum*, 3 Grant (Pa.), 180; *Claason's Appeal*, 23 Pa. St. 359; *Hendrickson's Appeal*, 24 Pa. St. 363.

debtor is not sufficient to pay both, the loss must be divided in equal proportions." ²⁹⁰

§ 452. Judgment given to secure Future Advances.

Though a judgment confessed to secure future advances to be made to the borrower himself will, in equity, be postponed to a subsequent *bona fide* judgment for a subsisting debt, except for such advances as had been made before the second judgment was obtained, yet a judgment confessed to secure existing debts which the plaintiff agrees to pay or assume, to the amount of the judgment, does not come within that category, and is valid from the date, against subsequent liens, although at the date of the confession no debt is specified except one due to the plaintiff himself.²⁹¹ A judgment entered on a bond conditioned that the obligor will pay to the obligee the sum of all notes, checks, drafts, and obligations which B. has incurred or may hereafter incur to a certain bank, is a lien for future advances as against intervening incumbrances only from the date of such future advances.²⁹²

§ 453. Prior Undocketed Judgment.

As we have already shown, a judgment does not attach as a lien upon real estate until it is duly entered of record. Hence a prior undocketed judgment will be postponed to a subsequent conveyance or incumbrance effected in good faith and put on record. And if, before the purchase of real estate, the purchaser, having received information that a transcript of a judgment against the owner has been filed, goes to the proper officers, and in good faith causes an examination of the records to be made, and they disclose the fact that there is no judgment-lien, he is justified in acting upon the belief that there is none.²⁹³ But if a judgment is actually recorded, the fact that a party is ignorant of it is due to his own negligence,

²⁹⁰ Hendrickson's Appeal, 24 Pa. St. 863.

²⁹² Kerr's Appeal, 92 Pa. St. 236.

²⁹³ Bell v. Davis, 75 Ind. 314.

²⁹¹ Walker v. Arthur, 9 Rich. Eq. 397.

against the consequences of which a court of equity cannot relieve him by interfering with the rights of others who are without fault.²⁹⁴

§ 454. As against Subsequent Dower Right.

Where the lien of a judgment has attached to land, and the owner afterward marries, the lien is not thereby divested or postponed to the wife's inchoate right of dower created by the marriage.²⁹⁵ But if the lien attaches subsequent to the marriage, it will be subordinate to the wife's right of dower.²⁹⁶

§ 455. Priority by Superior Diligence.

In cases where several judgments have an exact equality of lien, it will sometimes happen that one of the creditors, by his superior activity and diligence, will put himself in a position to claim a preference over the other, and such claim is always recognized and enforced. This is the case, in some states, where two judgments are entered on the same day, but one creditor sues out execution while the other remains inactive.²⁹⁷ And this claim, founded on superior vigilance, will sometimes even result in elevating a junior judgment above the rights of the elder lien. Thus, where plaintiff and defendant were judgment-creditors of the same party, and sought to enforce their judgments against a piece of land which had been fraudulently conveyed away by the judgment-debtor, it was held that, the plaintiff having taken the first steps to uncover the property fraudulently conveyed, his rights were superior to those of the defendant, although the latter held the senior judgment.²⁹⁸ On similar principles, an attachment is a valid charge upon land from the moment it is levied,

²⁹⁴ *Bunn v. Lindsay*, 95 Mo. 250, 7 S. W. Rep. 478.

²⁹⁵ *Brown v. Williams*, 81 Me. 408; *Sanford v. McLean*, 3 Paige, 117, 23 Am. Dec. 773; *Lane v. Gover*, 3 Har. & McH. 394; *Queen Anne's Co. v. Pratt*, 10 Md. 5; *Davidson v. Frew*, 3 Dev. 3, 22 Am. Dec. 708; *Hodges v. McCabe*, 3 Hawks, 73; *Bisland v. Hewitt*, 11 Sm. & Mar.

164; *Robbins v. Robbins*, 8 Blackf. 174; *Eiceman v. Finch*, 79 Ind. 511.

²⁹⁶ *Gould v. Lockett*, 47 Miss. 96, 116.

²⁹⁷ *Supra*, § 450.

²⁹⁸ *Boyle v. Maroney*, 73 Iowa, 70, 35 N. W. Rep. 145; *Bridgman v. McKisick*, 15 Iowa, 260; *Howland v. Knox*, 59 Iowa, 46, 12 N. W. Rep. 777; *Lyon v. Robbins*, 46 Ill. 276; *Armington v.*

so that a sale on execution relates back to that event for the purpose of defeating all intervening incumbrances, as a judgment recovered between the levy of the attachment and the judgment in the attachment suit.²⁹⁰ So again, if a judgment-creditor delivers his execution to the sheriff merely for the purpose of protection against other creditors and with no *bona fide* intention of making the money, and directs the sheriff not to levy, or not to sell, until he receives further orders, such acts will postpone the lien of his judgment to that of junior creditors who proceed in good faith to a levy and sale.²⁹¹

§ 456. Priority by Prior Levy.

There are some cases in which a junior judgment may acquire the precedence by virtue of superior diligence in making a levy. Thus, under the laws of some of the states, where a judgment-creditor allows more than one year to elapse after his judgment has become a lien on real estate, before he takes out and levies an execution, his lien becomes subsequent and inferior to the liens of other judgment-creditors.²⁹¹ In this connection we must call attention to an extremely interesting and peculiar question—called the “triangular question”—which arises where there is a judgment not levied within a year, a junior judgment levied within the year, and thus acquiring a preference as against the senior judgment, and an intervening mortgage executed and recorded prior to the rendition of the second judgment. Under these circumstances it is held that the senior judgment must be first paid, and then the mortgage, and the junior judgment must be postponed to both. The difficulties of the ques-

Rau, 100 Pa. St. 165; Haak's Appeal, 100 Pa. St. 59. But a very vigorous dissent from this opinion has been expressed in a recent case in Minnesota. Jackson v. Holbrook, 96 Minn. 494, 33 N. W. Rep. 852.

²⁹⁰ Lackey v. Selbert, 28 Mo. 85; Langdon v. Raiford, 20 Ala. 532. Compare Lichten v. McDougald, 5 Ga. 176.

²⁹¹ Field v. Liverman, 17 Mo. 218; Patton v. Hayter, 15 Ala. 18.

²⁹¹ Lamme v. Schilling, 25 Kans. 92. Under the laws of Ohio regulating the lien of judgments, a judgment levied within a year from its rendition, upon a part of the lands of the judgment debtor, is not a lien upon the lands not levied upon, as against a subsequent judgment rendered more than a year after the first and levied upon such lands within a year from its rendition. Pence v. Cochran, 6 Fed. Rep. 269.

tion, and its solution, are thus presented by the supreme court of Ohio: "If it be attempted to settle the question on the principle of superiority, it runs in a circle and produces no result. If the junior judgment takes it from the senior judgment, then the mortgage would take it from the junior judgment, and the senior judgment from the mortgage, and thus perpetually without a conclusion. If it be attempted to reason it out by interposing intervening liens, it results in a triangle of equal equities, without any circumstance to determine in favor of either. If it be said that the intervening mortgage should protect the senior judgment, because it was superior to the junior judgment and inferior to the senior, so it might, with equal reason, be said that the senior judgment should check the mortgage in favor of the junior judgment, or that the junior judgment should protect the mortgage from the senior judgment. The court therefore felt the necessity of establishing a rule, and that which was considered least objectionable was adopted, to wit, that each should have precedence according to age. This, too, has some show of reason in the fact that the lien of the senior judgment extended to the whole estate mortgaged, and the mortgagees took subject to such lien, and would hold only as to the balance of the estate after satisfying the senior judgment, and the lien of the junior judgment attached only to the balance left, if any, after satisfying the mortgage out of the balance left by the senior judgment. Or, in other words, the junior judgment attached only to the equity of redemption in that portion of the interest covered by the mortgage, after satisfying the lien of the senior judgment."³⁰² Where there are two executions against the same defendant, the lien of the executions, as between the execution-creditors, attaches from the levy, and not from the time at which they went into the hands of the officer.³⁰³

³⁰² Holliday v. Franklin Bank, 16 318; Fitch v. Mendenhall, 17 Ohio, 578. Ohio, 585; Brazee v. Bank, 14 Ohio, ³⁰³ Field v. Milburn, 9 Mo. 492.

§ 457. Postponement by Stay of Execution.

It is held that an extension of time for payment or stay of execution on real estate to a time short of the statutory period of limitation of a judgment-lien may be made without prejudice to the creditor, and does not postpone the judgment to other and junior judgments.³⁰⁴ But on the other hand, a mortgage for a valuable consideration made pending a stay of execution by order of the plaintiff, will take precedence of the judgment.³⁰⁵

§ 458. Postponement by Failure to Revive.

In those jurisdictions where a judgment, in order that its lien may continue, must be periodically revived, the lien of a judgment not revived within the statutory time will be superseded by the lien of younger judgments in full original life or which have been duly revived.³⁰⁶ And the same consequence will result although the record shows that the elder judgment was for purchase-money.³⁰⁷

§ 459. Sale under Junior Judgment.

It is the settled rule in at least two states, that the lien of the senior judgment is divested by a sale under the junior judgment and execution, and the remedy of the senior creditor is to claim enough of the fund to satisfy his judgment.³⁰⁸ And so, under a statute which provides that judgments shall take precedence in the order in which executions shall be taken out and levied, in a case where the first lien was a judgment on which no levy had been made, and the second lien was a mortgage, and the third a judgment under which a levy and sale took place, it was held that the lien of the elder judgment was destroyed, and in an action to foreclose the mort-

³⁰⁴ *Marshall v. Moore*, 36 Ill. 321.

³⁰⁵ *Sanford v. Ogden*, 34 Ala. 118.

³⁰⁶ *Bank v. Crevor*, 2 Rawle, 224.

³⁰⁷ *Ruth's Appeal*, 54 Pa. St. 173.

³⁰⁸ *Harrison v. McHenry*, 9 Ga. 164,

53 Am. Dec. 435; *Dowdell v. Neal*, 10

Ga. 148; *Sanders v. McAfee*, 42 Ga. 255;

Tarver v. Ellison, 57 Ga. 54; *Jones v.*

Wright, 60 Ga. 364; *Blohme v. Lynch*,

26 S. Car. 300, 2 S. E. Rep. 136.

gage, it was considered to be free from the lien of the first judgment, and, being prior to the second judgment, it was free from that lien also.³⁰⁰ But the general rule undoubtedly is, that a sale under the junior judgment does not divest the lien of the elder judgment; the property passes subject to such elder lien; the junior creditor is entitled to all the money made at his sale, but afterwards, at any time within the statutory period, the senior creditor may take the appropriate steps to enforce his lien.³¹⁰ And it is even held that where both judgments, the elder and the junior, are the property of the same person, he may proceed to levy and sell under the younger lien without any prejudice to his right afterwards to enforce the other, or without disturbing or destroying its lien, provided his conduct is free from any imputation of deceit or unfairness towards the purchaser.³¹¹

§ 460. Order of Priority on After-Acquired Lands.

If several judgments are rendered and entered against the same defendant at different times, and he afterwards acquires the legal title to real estate, the liens of the several judgments attach together upon the property at the same instant; all stand upon the same footing, and the oldest judgment has no priority.³¹² This general rule is accepted in all the states, so far as we have been able to discover, except Oregon. In that state, judgment-liens attach to after-acquired property in the order of the dates of the docketing of the judgments.³¹³ In another state, where *personal* property of the defendant in execution is brought into the county after executions of different judgment-creditors have come to the sheriff's hands against

³⁰⁰ *Lambertville Nat. Bank v. Boss* (N. J.), 18 Atl. Rep. 18. Compare *Holli-day v. Franklin Bank*, 16 Ohio, 585; *supra*, § 456.

³¹⁰ *Commercial Bank v. Yazoo Co.*, 6 How. (Miss.) 530, 38 Am. Dec. 447; *Ran-kin v. Scott*, 12 Wheat. 177; *Littlefield v. Nichols*, 42 Cal. 372; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Bruce v. Vogel*, 38 Mo. 100; *Lathrop v. Brown*,

28 Iowa, 40; *Hiestand v. Williamson* (Pa.), 18 Atl. Rep. 427.

³¹¹ *Shotwell v. Murray*, 1 Johns. Ch. 512.

³¹² *Relfe v. McComb*, 2 Head, 553, 75 Am. Dec. 748; *Michaels v. Boyd*, 1 Smith (Ind.), 100; *Moody v. Harper*, 25 Miss. 484; *Cayce v. Stovall*, 50 Miss. 396; *Davis v. Benton*, 2 Sneed, 665.

³¹³ *Creighton v. Leeds*, 9 Oreg. 215.

such defendant, the eldest judgment-creditor who has preserved his lien will have the prior right.²¹⁴

PART VI. DURATION OF THE LIEN.

§ 461. General Rules.

In the statutes of every state there is fixed a limitation of the period during which a judgment shall continue to be a lien upon real estate. Sometimes this period is set absolutely at ten years; sometimes the lien runs for five years, with the privilege of renewal for an equal period, and successive revivals after that; and in some jurisdictions the statutory time may vary from the types here cited. Occasionally we meet with a statute which makes the life of the lien depend upon the issuing of execution, or which makes a distinction, as to its continuance, founded on the character of the person against whom it is set up, whether he be the debtor, a purchaser, or a subsequent incumbrancer. Thus, in Nebraska, the lien of a judgment continues for five years after the rendition of the judgment, and as against all persons except *bona fide* judgment-creditors, for five years after the issuance of execution.²¹⁵ A judgment, however, does not lose its lien upon real estate by the suffering of an execution, issued thereon, to lie dormant in the sheriff's hands. The doctrine on the subject of dormant executions does not apply to real estate, the lien upon which depends upon the docketing of the judgment, and not upon the execution or levy. And such lien does not become dormant until the expiration of the full statutory limitation.²¹⁶ In cases where the judgment must be periodically revived, it is held that the ques-

²¹⁴ Wood v. Gary, 5 Ala. 43.

²¹⁵ Reynolds v. Cobb, 15 Nebr. 373, 19 N. W. Rep. 502. See Pasour v. Rhyne, 33 N. Car. 149. Under Code Va. 1873, c. 182, §§ 12, 13, providing that no execution shall issue, nor any *sc. fa.* or action brought, on certain judgments after the lapse of ten years from the return-day of an execution on which there is no return by an officer, or after

twenty years from the return-day of an execution on which there is such return, a judgment on which no execution has ever been issued becomes dead, both in law and equity, after ten years, and ceases to be a lien upon the real estate of the defendant. McCarty v. Ball, 39 Va. 372, 1 S. E. Rep. 189.

²¹⁶ Muir v. Leitch, 7 Barb. 341.

tion, whether the lien has been kept alive and remains in force, must be determined by an inspection of the record; if the record does not show its existence, the lien is lost.²¹⁷ The lien of a judgment in favor of the state is never lost by lapse of time.²¹⁸

§ 462. Dormant Judgment Acts.

In the state of Georgia there are statutes—called the “dormant judgment acts”—which prescribe that after the lapse of a certain time, the lien of a judgment shall be lost, unless, within that time, steps have been taken to enforce it. These laws, it is held, are not merely statutes of limitation; and, as against junior judgment-creditors, dormancy is not prevented by an entry on an execution in these words: “Dec. 1, 1881. Paid on the within execution five dollars, balance due and unpaid,” signed by the defendant.²¹⁹ A decree in equity which merely prescribes the performance of a duty, is not within either the letter or the spirit of these acts.²²⁰ Of course such a decree creates no lien; but the point of the decision is that the statutes in question form no obstacle to an order that the decree be carried out, made after the statutory time for the limitation of judgments.

§ 463. Legislative Abridgment of the Time.

It is a familiar principle of constitutional law that a statute, retroactive in its operation, which merely changes the remedy provided for the enforcement of an existing right, cannot be said to impair the obligation of contracts, if a substantive and effective remedy is still left to the creditor. And it is an equally well known rule that a statute of limitations, applying retroactively to existing rights or remedies and abridging the period of time allowed for their enforcement, is not invalid in such application, if a reasonable

²¹⁷ Duffey v. Houtz, 105 Pa. St. 96.

S. E. Rep. 260. See also Nelson v. Gill,

²¹⁸ Commonwealth v. Baldwin, 1

56 Ga. 536.

Watts, 54, 26 Am. Dec. 83.

²¹⁹ Butler v. James, 83 Ga. 143.

²²⁰ Stanley v. McWhorter, 78 Ga. 37, 1

length of time is left for the assertion of such rights, or the prosecution of such remedies, before the bar of the statute cuts them off. Now, using these two admitted rules as premises, it is easy to deduce the conclusion that a statute shortening the time during which, by earlier laws, the lien of a judgment was to continue, is not open to any constitutional objection, in its application to judgments whose lien had attached before the act was passed, if a reasonable time (though less than the original period) is still allowed to the judgment-creditor in which to enforce his lien. And so the authorities hold.³²¹ But the case is different if the statute is made to apply to a case in which the whole of the new period of limitation had run before the passage of the act, so that the lien would be instantly cut off. Thus, where a statute had provided that a final judgment should be a lien for ten years, and that the creditor might have an additional three years within which to revive it, and a later act repealed the proviso allowing the additional three years, it was held that the latter act was unconstitutional, as interfering with vested rights, when applied to a judgment the lien of which had expired before its passage, but the additional three years for reviving which had not then expired.³²²

§ 464. Lien of Transferred Judgment.

The length of time during which the lien of a judgment transferred from one county to another shall continue depends entirely upon the construction of the local statute. In Pennsylvania such lien continues for five years from the entry of the judgment in the county to which it is transferred.³²³ But on the other hand, in Indiana, under a statute declaring that the lien of a judgment shall continue for ten years after the rendition thereof, and another statute, providing that when a transcript of a judgment from another county is filed, the judgment set forth in the transcript shall be a lien on property within the county to the same extent as judgments of the local court, from the time of filing the transcript, it is held that the lien of a judg-

³²¹ *Henry v. Henry* (S. Car.), 9 S. E. Rep. 726; *McCormick v. Alexander*, 2 Ohio, 65; *supra*, § 399.

³²² *King v. Belcher* (S. Car.), 9 S. E. Rep. 859.

³²³ *Knauss' Appeal*, 49 Pa. St. 419.

ment, a transcript of which is filed in another county, is in force for ten years after its rendition, and not ten years from the time of filing the transcript.²²⁴

§ 465. Extension of Lien by Agreement of Parties.

It has been held that where a judgment is rendered in pursuance of a written agreement of the parties, entered of record, that the judgment shall be rendered collectible and payable nine years from its date, the ten years during which such judgment will remain a lien on the real estate of the defendant will not commence to run until the expiration of the nine years.²²⁵ In the case cited the law of Indiana is thus stated: The lien of judgments upon real estate is regulated by statute, and the general rule is that the lien continues for ten years from the rendition of the judgment and no longer; but there are four exceptions, the statute excluding from the computation of time (1) the time during which the party is restrained by an appeal from proceeding, (2) the time during which the plaintiff is restrained by an injunction, (3) the time the plaintiff may be prevented from proceeding by the death of the defendant, and (4) the time the plaintiff may be prevented from enforcing the judgment by an agreement of the parties entered of record. But it must be considered very doubtful whether any such exception as that last mentioned would be admitted in other states, unless specifically provided for by the statute. As between the parties a judgment may be kept alive, although once paid, for the purpose of securing another loan; but as against subsequent lien-creditors, a mortgage or judgment once paid cannot be kept alive.²²⁶

§ 466. Survival against Judgment-Debtor.

The lien of a judgment expires, at the end of the statutory period, only as against subsequent purchasers or incumbrancers, but it still

²²⁴ *Brown v. Wuskoff*, 118 Ind. 569, 19 N. E. Rep. 468. See a later decision in the same case in 21 N. E. Rep. 248.

²²⁵ *Applegate v. Edwards*, 45 Ind. 329.

²²⁶ *Pelrce v. Black*, 105 Pa. St. 342.

continues, the judgment being unsatisfied, against the judgment-debtor himself.³²⁷ Hence if one suffers his property to be sold on execution issued on a judgment after its lien has expired by limitation, he cannot afterwards, in a collateral proceeding, call in question the validity of the sale.³²⁸ So in a case where the real estate of a debtor was sold by the sheriff, and the proceeds applied to the payment of all judgments which had been either entered or revived within five years, and they were all thereby discharged, and there was a surplus, and there were two judgments the liens of which had expired, in consequence of their not being revived, it was held that the surplus belonged to the holders of those two judgments. For although, as to creditors whose judgment-liens were in force, these unrevived judgments had undoubtedly ceased to be liens, yet, as between them and the judgment-debtor, the liens continued notwithstanding their non-revival within the statutory time.³²⁹ Inasmuch as the statutes ordinarily provide that the lien shall expire, after a certain time, as against "*bona fide* purchasers and subsequent incumbrancers," some attention to these terms becomes necessary. As to the former, it is held that if a purchaser collusively contrives with the judgment-debtor to deprive the creditor of his lien upon the lands purchased, knowing that the judgment is unpaid, or if he purchases under circumstances indicating an intention to deprive the creditor of the means of collecting his judgment, such purchaser will not be protected as a *bona fide* purchaser of the land, discharged of the lien of such judgment, although he pays the full value of the estate.³³⁰ As to the term "subsequent incumbrancers" in these statutes, it is held to apply to creditors of a grantee of the judgment-debtor, where the conveyance was made within the statutory period, and the debts were contracted after the grantee's investiture with the legal title.³³¹

³²⁷ McCahan v. Elliott, 108 Pa. St. 684; Fetterman v. Murphy, 4 Watts, 424, 28 Am. Dec. 729; Aurand's Appeal, 84 Pa. St. 151; Bank of North America v. Fitzsimmons, 8 Binn. 342.

³²⁸ Hinds v. Scott, 11 Pa. St. 19, 51 Am. Dec. 506; Tufts v. Tufts, 18 Wend.

631; Yeager v. Davis, 112 Ind. 280, 12 N. E. Rep. 707.

³²⁹ Brown's Appeal, 91 Pa. St. 485.

³³⁰ Pettit v. Shepherd, 5 Paige, 493, 33 Am. Dec. 487.

³³¹ Gridley v. Watson, 53 Ill. 186.

§ 467. Death of Judgment-Debtor.

In the state of Pennsylvania the lien of a judgment is continued as to land bound by it for the period of five years after the defendant's death, although he aliened the land after the rendition of the judgment.³³² And as against his heirs or devisees, the lien is without limit and need not be revived.³³³ "A judgment of record at the time of the death of the defendant, though without lien on his real estate at the time of death, does not fall into the class of mere debts, whose lien is limited to five years after the death of a decedent unless suit be brought for the same, according to section 24 of the act of Feb. 24, 1834. That section expressly excepts debts secured by mortgage or judgment. The record gives notice of the debt to all persons interested, and it remains unaffected by time as to all volunteers, until a presumption of payment arises."³³⁴

§ 468. Remedies of Creditor after Expiration of Lien.

It is well settled that the lien of a judgment cannot be enforced in equity after the right to enforce the judgment at law has ceased to exist.³³⁵ Nor, if the creditor has lost his lien by the failure to take the proper steps in time, can he change the result by the mere act of issuing an execution.³³⁶ But it is not necessary that a judgment should be revived in order to maintain its lien on money in the sheriff's hands.³³⁷

PART VII. SUSPENSION AND DISCHARGE OF JUDGMENT-LIENS.**§ 469. General Principles.**

Inasmuch as the lien of a judgment does not merely bind the debtor's estate by his own consent or sufferance, but attaches by force

³³² *Stevenson v. Black* (Pa.), 1 Atl. Rep. 812, following *Nicholas v. Phelps*, 15 Pa. St. 86.

³³³ *Shearer v. Brinley*, 76 Pa. St. 300; *Konigsmaker v. Brown*, 14 Pa. St. 269.

³³⁴ *Baxter v. Allen*, 77 Pa. St. 468.

³³⁵ *Smith v. Meredith*, 30 Md. 429; *Hutcheson v. Grubbs*, 80 Va. 251.

³³⁶ *Roe v. Swart*, 5 Cow. 294.

³³⁷ *Commonwealth v. Gleim*, 3 Penn. & W. 417.

of law in consequence of the rendition of the judgment against him, it follows that he cannot relieve his land from its burden by any act short of satisfying the judgment, nor can he, without a release from the judgment-creditor, change, limit, or impair the lien or prejudice the rights of its holder. The act of the debtor, therefore, in selling, conveying, mortgaging, or leasing the land, or his abandonment or repudiation of the title, or attornment to a third person (if he really had an interest subject to the judgment), cannot affect or destroy the lien of the judgment when once it has attached.³³⁹ Thus a voluntary assignment for the benefit of creditors does not affect liens on the land assigned created by existing judgments against the assignor.³⁴⁰ Nor, after such an assignment, does the failure of a creditor to sue out and levy execution impair the lien of his judgment.³⁴¹ But in one state it has been held that although a judgment is by law a lien upon the land of the defendant, yet he may after the judgment convey good title, if he has at all times afterwards a sufficient amount of property, subject to and within reach of an execution, to satisfy the judgment.³⁴²

§ 470. Suspension of Lien by Injunction.

An injunction against the enforcement of a judgment at law, if not perpetual, does not destroy the lien of the judgment, but merely suspends it until the dissolution of the injunction, after which the lien will revive and continue for the full statutory period.³⁴³ Whether this statutory period is to be computed *exclusive* of the time during which the lien was so suspended, is not clear upon the authorities, and must be determined by the language of the local statute. In one state the law expressly excepts from the computation of the period for which the lien continues in life "the time during which

³³⁹ *Morris v. Mowatt*, 2 Paige, 586, 23 Am. Dec. 661; *Decker v. Gilbert*, 80 Ind. 107; *Brooker v. Sprague*, 99 Ind. 169; *Rodgers v. McCluer*, 4 Gratt. 81, 47 Am. Dec. 715; *Agricultural Bank v. Pallen*, 8 Sm. & Mar. 357, 47 Am. Dec. 92; *Tinney v. Wolston*, 41 Ill. 215.

³⁴⁰ *Schaeffer's Appeal*, 101 Pa. St. 45.

³⁴¹ *Scott v. Dunn*, 26 Ohio St. 63.

³⁴² *Howse v. Judson*, 1 Fla. 133.

³⁴³ *Smith v. Everby*, 4 How. (Mass.) 178; *Lynn v. Gridley, Walker* (Mass.), 548, 12 Am. Dec. 591; *supra*, § 395.

the plaintiff is restrained by an injunction."³²³ But in another state, for want of a similar saving clause in the statute, the courts have been forced to conclude that if the lien ran out during the pendency of such an injunction, it was finally lost, and could not be revived, upon the dissolution of the injunction, at least as against a *bona fide* purchaser from the judgment-debtor.³²⁴ But here considerations of equity must intervene, and it becomes important to inquire at whose instance the injunction was issued. For instance, in a case where the creditor was prevented from enforcing his execution until after the time prescribed by the statute, in consequence of an injunction granted on the application of a mortgagee of the property, the lien of whose mortgage was, at the issuance of the injunction, secondary to that of the judgment, and the injunction was subsequently dissolved, upon the failure of the mortgagee to establish his claim to protection, it was held that he could not take advantage of the fact that the lien of the judgment was lost, and that he was not entitled to hold the property discharged of the lien of the judgment.³²⁵ In Alabama a judgment-lien is discharged by an injunction issued upon the execution of a bond with sureties by the judgment-debtor, if the bond provides the plaintiff with another security for the payment of his judgment.³²⁶

§ 471. Stay of Proceedings.

In general, the lien of a judgment is not destroyed by an agreement of the parties to stay execution for a specified period.³²⁷ And a stay of proceedings by order of court, pending a motion for a new trial, or by appeal with stay-bond, merely suspends the running of the statutory time during which a judgment is a lien on real estate, but it does not postpone its beginning until after the stay has ceased.³²⁸

³²³ Applegate v. Edwards, 45 Ind. 839.

³²⁴ Tucker v. Shade, 35 Ohio St. 355.

³²⁵ Work v. Harper, 31 Miss. 107, 66 Am. Dec. 549.

³²⁶ Bartlett v. Gayle, 6 Ala. 305.

³²⁷ Brewster v. Clamfit, 33 Ark. 72;

Love v. Harper, 4 Humph. 113; Ayers v. Waul, 44 Tex. 549.

³²⁸ Barroilhet v. Hathaway, 31 Cal. 395, 39 Am. Dec. 198; Isler v. Brown, 66 N. Carr. 556.

§ 472. Opening or Vacating Judgment.

Opening a default judgment merely to let the defendant in to a defense does not destroy its lien; the lien continues for the statutory period.³⁰⁰ But *vacating* a judgment effectually obliterates it for all purposes; and of course the lien is thereby cancelled, leaving the judgment-debtor free to sell or incumber the property anew. But judgments which have been vacated are sometimes restored, and thereby the lien of the judgment re-attaches. A party whose judgment has been illegally vacated will not be deprived of his lien if he ultimately procures the reversal of the order which set it aside, unless the equities of *bona fide* purchasers or incumbrancers have intervened. And further, the lien is restored to the exact position it occupied at the time the judgment was vacated. That is, it continues to take precedence of any liens which were junior to it at that date, unless the holders of such junior liens have acquired new rights, by proceedings under their several judgments, of which they cannot justly be deprived.³⁰¹

§ 473. Appeal or Error.

It is generally held that the lien of a judgment is not discharged by an appeal being taken, but merely suspended; nor is the judgment on appeal a discharge of the lien of the judgment below.³⁰² "Even if there be a new judgment [*e. g.*, of affirmance on appeal], this does not necessarily destroy the lien which the law has given, for it is competent for the law to keep the lien in existence, although a new judgment be predicated on the first."³⁰³ And where a decree is reversed in part and affirmed as to the residue, the reversal in part does not destroy the lien of so much of the decree as is unreversed.³⁰⁴

³⁰⁰ Cope's Appeal, 96 Pa. St. 294.

³⁰¹ King v. Harris, 84 N. Y. 380, s. c. 30 Barb. 471.

³⁰² Hardee v. Stovall, 1 Ga. 92; Montgomery v. McGimpsey, 7 Sm. & Mar. 557; Curtis v. Root, 28 Ill. 367; Moore v. Rittenhouse, 15 Ohio St. 310; Dewey v.

Latson, 6 Cal. 180; Leonard's Appeal, 94 Pa. St. 180. *Per contra*, Campbell v. Spence, 4 Ala. 543, 39 Am. Dec. 301.

³⁰³ Planters' Bank v. Calvit, 8 Sm. & Mar. 143, 41 Am. Dec. 616.

³⁰⁴ Thomson v. Chapman, 83 Va. 215, 2 S. E. Rep. 273.

§ 474. Bankruptcy.

The lien of a judgment-creditor who fails to prove his debt is not displaced by the subsequent bankruptcy of the debtor. And where a judgment-debtor is declared a bankrupt, has his homestead set apart, procures his discharge, and afterwards disposes of the property set apart as a homestead, it at once becomes subject to execution under the prior judgment. "Liens are not destroyed but preserved by the bankrupt act."³⁵⁴

§ 475. Appointment of Receiver.

It is held that the lien of a judgment on the real estate of a corporation is not lost or affected by the subsequent appointment of a receiver to settle the business of such corporation; nor is the judgment-plaintiff thereby prevented from proceeding by execution, levy, and sale of such property to make his debt.³⁵⁵

§ 476. Taking Defendant on Ca. Sa.

At common law, "the writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods."³⁵⁶ Hence the lien of the judgment is destroyed by an execution against the debtor's person. It may, however, revive, in the few cases in which the creditor, failing to obtain satisfaction by this means, is permitted to resort to other remedies; but not as against intervening rights. "If the plaintiff be remitted to other remedies by a discharge of his debtor by act of law, or by an escape, it will not operate to restore his lien on the debtor's property, which he has elected to waive or abandon, as against creditors who have obtained a precedence during such sus-

³⁵⁴ Jackson v. Allen, 30 Ark. 110; McCance v. Taylor, 10 Gratt. 590.

³⁵⁵ Southern Bank v. Ohio Ins. Co., 22 Ind. 181.

³⁵⁶ 3 Bl. Comm. 414.

pension."³²⁷ Where a judgment is recovered against several, and a *ca. sa.* served on one of them, who executes a forthcoming bond, which is forfeited, this does not extinguish the lien of the judgment upon the land of the others.³²⁸

§ 477. Payment.

The lien of a judgment is discharged by payment of the judgment.³²⁹ But a tender of the amount of the judgment, if not accepted, does not extinguish its lien.³³⁰ An attorney's lien upon a judgment affects only his client's interests, and not the right of the opposite party to discharge the judgment with depreciated funds.³³¹ But although a judgment lien or obligation may be extinguished at law by the payment of the debt, yet, for the benefit of a surety who has paid it, the lien in equity continues in full force.³³² But after it is thus discharged, it is said that the lien cannot be restored by any subsequent agreement between the parties;³³³ although, in some jurisdictions, it appears that it may be kept alive for the purpose of securing further advances.³³⁴

§ 478. Cancellation or Entry of Satisfaction.

A judgment creditor who enters satisfaction of his judgment, or causes an execution to be returned satisfied, authorizes others to treat the property of the debtor as released from the lien incident to the judgment.³³⁵ And so a judgment, when cancelled by order of the court, ceases to be a lien on real estate owned by the debtor during the life of the judgment.³³⁶ On the same principle, where the defendant executed his notes for the amount of the judgment rendered

³²⁷ *Rockhill v. Hanna*, 15 How. 189.

³²⁸ *Leake v. Ferguson*, 2 Gratt. 419.

³²⁹ *Banks v. Evans*, 10 Sm. & Mar. 85, 48 Am. Dec. 784.

³³⁰ *People v. Beebe*, 1 Barb. 379; *Law v. Jackson*, 9 Cow. 641.

³³¹ *Neil v. Staten*, 7 Heisk. 290.

³³² *German American Sav. Bank v. Fritz*, 68 Wis. 890, 33 N. W. Rep. 123.

³³³ *De La Vergne v. Evertson*, 1 Paige, 181, 19 Am. Dec. 411.

³³⁴ *Peirce v. Black*, 105 Pa. St. 342.

³³⁵ *Page v. Benson*, 23 Ill. 484; *Bank v. Ford*, 18 Ala. 481.

³³⁶ *Worthington v. Nelson* (Iowa), 36 N. W. Rep. 911.

against him, which was subsequently cancelled, it was held that the judgment ceased to exist, and there was no longer a lien upon the defendant's real estate, when no fraud was imputable in obtaining the cancellation.³⁶⁷

§ 479. Sale of the Land.

A sale of land under an execution extinguishes the lien of the judgment on the land sold.³⁶⁸

§ 480. Acquisition of Title by Judgment-Creditor.

Since a judgment is a general lien upon all the debtor's real estate, it does not merge when the judgment-creditor acquires title to a particular portion of such lands, but may, in ordinary cases, be enforced against the remaining lands.³⁶⁹ In case the creditor should become the owner of the *only* piece of land belonging to the debtor, there would probably be a merger of the lien, but no loss of the right to satisfy the judgment by levy upon personalty. But the precise question does not appear to have come before the courts.

§ 481. Release of Lien.

A release by a judgment creditor, at the instance of the debtor, of one of several tracts of land bound by a judgment, will not operate as a release of the others.³⁷⁰ It is said that a release of a judgment-lien may be by parol, but the proof thereof must be clear, satisfactory, and conclusive.³⁷¹ There may also be a species of release in equity or by estoppel. Thus, where lands subject to the incumbrance of a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment-debtor and are entitled to the same equities; and a release by the judgment-creditor,

³⁶⁷ Polk Co. v. Nelson (Iowa), 43 N. W. Rep. 80.

³⁶⁸ Surtliff v. Easton, 2 Wend. 297.

³⁶⁹ Caley v. Morgan, 114 Ind. 350, 16 N. E. Rep. 790.

³⁷⁰ Wolfe v. Gardner, 4 Harringt. 333.

³⁷¹ Dalby v. Cronkhite, 23 Iowa, 222.

without their consent and with knowledge of their rights, of any security to which, in equity, they would be entitled on payment of the judgment, discharges the lien of the judgment.²⁷² In a case in New York, it appeared that the agent of the judgment-creditor was present at a sale, by the debtor to a third person, of certain lands on which the judgment was a lien, drew the conveyance, and was informed of the sale, and the debtor soon afterward delivered to such agent, as security for the judgment-debt, the notes given in payment for the land conveyed. It was held that the receipt of these notes by the agent of the creditor, with knowledge of their consideration, although it did not affect the creditor's lien upon the lot as security for the judgment in case it should not be otherwise satisfied, imposed on him, in equity, a duty to apply the proceeds of the notes in reduction of the judgment.²⁷³

²⁷² *Barnes v. Mott*, 64 N. Y. 397, 21
Am. Rep. 635.

²⁷³ *Ingalls v. Morgan*, 10 N. Y. 178.

CHAPTER XVII.

REVIVAL OF JUDGMENTS BY SCIRE FACIAS.

- § 483. Nature and Functions of the Writ.
- 483. Venue of the Action.
- 484. Right to sue out *Scire Facias*.
- 485. Time of Issuing the Writ.
- 486. Pleadings.
- 487. Service of Writ.
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- 498. Judgment on *Scire Facias*.
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§ 482. Nature and Functions of the Writ.

A *scire facias* is a judicial writ founded upon some matter of record, as a judgment, mortgage, recognizance, tax-lien, or letters-patent, and requiring the person against whom it is brought to show cause why the party bringing it should not have the advantage of such record, or (as in the case of *scire facias* to repeal letters patent) why the record should not be annulled and vacated.¹ Among the various uses to which this writ may be put, two only are important to our present purpose. In the first place, it lies to secure the right to issue execution on a judgment, when that right has either become dormant through failure to exercise it, or cannot be exercised without preliminary judicial proceedings. Thus, in the case of a judgment against an executor of assets *quando acciderint*, and in cases where a new person is to be charged or benefited by the execution, *scire*

¹ Brown's Law Dict. tit. "*Scire Facias*;" 2 Tidd's Pr. 1090.

facias is first to be brought. So, at common law, all writs of execution had to be sued out within a year and a day after the judgment was entered, otherwise the judgment was presumed to be satisfied and extinct, but this writ would lie to revive the right to issue execution if such presumption were contrary to the fact.² In any of these cases the writ commands the sheriff to "make known" to the defendant that he be in court on the return-day, in order to show cause why the plaintiff ought not to have execution against him; and it is more fully described as a writ of *scire facias quare executionem non*. In the second place, the statutes of some of the states provide that a judgment shall cease to be a lien on real estate at the expiration of a certain period of time (usually five or ten years), but also provide that, within that period, the judgment may be revived by a proceeding by *scire facias*, with the effect of continuing its lien for another like period. When used for this purpose, the writ requires the defendant to show cause why the judgment should not be revived and its lien continued.

In this sense, the proceeding by *scire facias*, while it partakes in some measure of the characteristics of an independent action at law (as, in requiring service of a writ and a plea by the defendant), yet is not regarded as a new suit. In contemplation of law it is merely a continuation of the action which resulted in the judgment now sought to be revived, and as dependent upon the liability already created by that judgment.³ Each successive writ of *scire facias* to revive a judgment, or to recover damages for the breach of the con-

² Brown, *ubi sup.* See *Pennock v. Hart*, 8 Serg. & R. 869.

³ *Hatch v. Eustis*, 1 Gall. 160; *Fitzhugh v. Blake*, 2 Cranch C. C. 87; *Adams v. Rowe*, 11 Me. 89, 25 Am. Dec. 266; *State Treasurer v. Foster*, 7 Vt. 52; *Comstock v. Holbrook*, 16 Gray, 111; *Gray v. Thrasher*, 104 Mass. 878; *Eldred v. Hazlett*, 88 Pa. St. 16; *Irwin v. Nixon's Heirs*, 11 Pa. St. 419, 51 Am. Dec. 559; *Kirkland v. Krebs*, 84 Md. 98; *Ingram v. Belk*, 2 Strobb. 207, 47 Am. Dec. 591; *Funderburk v. Smith*, 74 Ga. 515; *Brown v. Harley*, 2 Fla. 159; *Perkins*

v. Hume, 10 Tex. 50; *Masterson v. Cundiff*, 58 Tex. 472; *Carter v. Carriger*, 8 Yerg. 411, 24 Am. Dec. 585; *Blackwell v. State*, 8 Ark. 320; *Wolf v. Poundsford*, 4 Ohio, 397; *Challenor v. Niles*, 78 Ill. 78; *Denegre v. Haun*, 13 Iowa. 240; *Eaton v. Hasty*, 6 Nebr. 419, 29 Am. Rep. 865. But a *scire facias* to revive a judgment on which no execution issued in a year and a day may be regarded as a suit on the judgment, so far as concerns the plaintiff's right to discontinue as to parties not served. *Hanson v. Jacks*, 23 Ala. 549.

dition of a bond on which the judgment has been rendered, must be founded upon the judgment which immediately preceded it; for a recovery upon a writ of *scire facias* is a bar to any subsequent recovery upon the original judgment.⁴ It must be observed that this writ, as a remedy for the revival or enforcement of a judgment, is not universally applicable in the United States. In some jurisdictions, where the only form of action authorized by law is the "civil action," the writ of *scire facias* is unknown in practice.⁵

§ 483. Venue of the Action.

It is a settled rule that a *scire facias* to revive a judgment can issue only from the court in which the record remains of the judgment to be revived.⁶ Thus, proceedings to revive a judgment against the heirs of the defendant, so as to have execution against lands inherited by them, must be brought in the court where the judgment was rendered, and an independent suit therefor in another county, where a transcript had been filed to obtain a lien, cannot be maintained where the lands have been sold without fraud.⁷ Where the defendant resides out of the county, service must be perfected by sending out process to the county where he is to be found, directed to the sheriff of that county, whose duty it then becomes to serve and return the process.⁸ Where a judgment has been obtained before a justice of the peace, and a transcript taken and filed in the court of common pleas, a *scire facias* to revive the judgment must be issued by the common pleas and not by the justice.⁹ This writ cannot be brought in a court of chancery to enforce or revive a decree, unless

⁴ Collingwood v. Carson, 2 Watts & S. 320; Custer v. Dettler, 3 Watts & S. 28.

⁵ Humiston v. Smith, 21 Cal. 129.

⁶ Vallance v. Sawyer, 4 Me. 62; State v. Brown, 41 Me. 535; State v. Kinne, 39 N. H. 129; Carlton v. Young, 1 Aik. 382; Gibson v. Davis, 23 Vt. 874; Osgood v. Thurston, 23 Pick. 110; Dougherty's Estate, 9 Watts & S. 189, 42 Am. Dec. 336; Boylan v. Anderson, 8 N. J. Law, 529; Tindall v. Carson, 16 N. J. Law, 94; Grimke's Exrs. v. Mayrant, 2 Brev.

202; Dickinson v. Allison, 10 Ga. 557; Funderburk v. Smith, 74 Ga. 515; Chapman v. Nelson, 81 La. Ann. 341; Masterson v. Cundiff, 58 Tex. 472; Schmitz v. Miller, 71 Tex. 108, 8 S. W. Rep. 638; Challenor v. Niles, 78 Ill. 78; Cames v. Crandall, 4 Iowa, 151; Wilson v. Tierman, 8 Mo. 577.

⁷ Thompson v. Parker, 88 Ind. 96.

⁸ Dickinson v. Allison, 10 Ga. 557.

⁹ Brannan v. Kelley, 8 Serg. & R. 479.

there be a statute authorizing executions to issue upon decrees in equity.¹⁰

§ 484. Right to Sue out Scire Facias.

At common law, a party was not entitled to maintain a *scire facias* to have execution of a judgment where there was no change of parties, and the writ was available only in cases where the time for issuing execution was past.¹¹ But according to the modern decisions, an action of debt, or a *scire facias*, may be brought on a judgment after an execution has issued, and it is not a valid objection to such a proceeding that, at the time of its commencement, the plaintiff could have proceeded by execution.¹² And where a party unnecessarily sues out a *scire facias*, when he might have an immediate execution, the writ should not be quashed for that reason, but execution should not issue until he obtains judgment under the writ.¹³ Complete satisfaction of the judgment will alone suffice to prevent its revival in this manner. Thus a subsisting levy on land is no bar to a *scire facias* on the judgment to continue its lien or to substitute a representative of either party.¹⁴ So a conditional appropriation by an auditor to a judgment-creditor in the distribution of proceeds of the debtor's real estate, will not prevent the reviving of the judgment for the whole amount, where no money has been actually received upon it, and the conditions attached to the appropriation have not been fulfilled.¹⁵ So a *scire facias* may be issued to revive a judgment which has been removed by a writ of error sued out without bail and still pending; for a writ of error without bail is not a *supersedeas*.¹⁶ But the writ cannot be used to revive a judgment on which no execution could ever have issued.¹⁷

¹⁰ *Jeffreys v. Yarborough*, 1 Dev. Ch. 510; *Curtis v. Hawn*, 14 Ohio, 185; *Logan v. Cloyd*, 1 A. K. Mar. 201.

¹¹ *Harmon v. Dedrick*, 8 Barb. 192.

¹² *Stewart v. Peterson's Exr.*, 68 Pa. St. 280; *Stille v. Wood*, 1 N. J. Law, 118.

¹³ *Lambson v. Moffett*, 61 Md. 426.

¹⁴ *Trapnall v. Richardson*, 18 Ark. 543, 58 Am. Dec. 388.

¹⁵ *Masser v. Dewart*, 46 Pa. St. 534.

¹⁶ *Boyer v. Rees*, 4 Watts, 201.

¹⁷ *Turner v. Dupree*, 19 Ala. 193; *Horton v. Clark*, 40 Ga. 412.

§ 485. Time of Issuing the Writ.

Where the statute provides that no judgment shall continue a lien on realty for a longer period than five years (or ten years) from the day of entry or revivor, unless a writ of *scire facias* to revive it be sued out within that period, the limitation of the time of bringing the writ begins to run from the rendition of the judgment.¹⁸ But in such case the day of entry of the judgment is to be excluded in the computation of the period within which it must be revived.¹⁹ And where the last day of the period thus computed falls on Sunday, a writ of *scire facias* issued on the Monday following is in time to preserve the lien.²⁰ And if the process of *scire facias* to revive issues a single day within the time, it saves the bar; and the terre-tenant may be connected with this process, though not named in it, by an *alias*, which latter may issue any time within five years.²¹ In some states, the life of a judgment-lien is continued for a certain period after the death of the debtor, without reference to the time that may have elapsed since its entry or last revival, provided it had not then become dormant. But elsewhere it is held that if more than five years of the whole period (ten years) have elapsed during the life of the debtor, then the creditor has only the remainder of the ten years in which to revive the judgment against the personal representatives.²² In Pennsylvania a judgment may be revived against terre-tenants at any time within the period of five years, notwithstanding there may have been an intermediate revival by *scire facias* without notice to them.²³ But an *alias scire facias*, issued after five terms from the former, is not sufficient to preserve the lien of a judgment which had expired in the interval.²⁴ In the same state it was for-

¹⁸ Scott v. Seelye, 39 La. Ann. 749, 2 South. Rep. 309; Ayre v. Burke (Va.), 4 S. E. Rep. 618.

¹⁹ Green's Appeal, 6 Watts & S. 327; Lutz's Appeal, 124 Pa. St. 273, 16 Atl. Rep. 858.

²⁰ Lutz's Appeal, 124 Pa. St. 273, 16 Atl. Rep. 858.

²¹ Lichty v. Hochstetler, 91 Pa. St.

444; Porter v. Hitchcock, 98 Pa. St. 625; Silverthorn v. Townshend, 37 Pa. St. 263.

²² Handy v. Smith's Admr., 30 W. Va. 195, 3 S. E. Rep. 604.

²³ Fursht v. Overdeer, 3 Watts & S. 470.

²⁴ Allen v. Liggett, 81 Pa. St. 436.

merly held that where there was a stay of execution, the five years within which the judgment must be revived, did not begin to run until the expiration of the stay.²⁵ But this was afterwards changed by a statute.²⁶

§ 486. Pleadings.

The writ of *scire facias* to revive a judgment is not merely a form of summons or citation to the defendant; it also serves the purpose of a declaration, to which the defendant may plead or demur, as to any other declaration. And as the proceeding is not original, but a continuation of the former action, the plaintiff is not required to file a new declaration or rule the defendant to plead.²⁷ Where a legal title to have execution of the original judgment is not set out in the writ, judgment may be arrested as for want of a cause of action.²⁸ A *scire facias* to revive a judgment must therefore follow the original judgment in amount, date, and parties; otherwise it is defective under a plea of *nul tiel record*.²⁹ But it is sufficient if the writ contains such recitals as will point to the judgment intended to be revived with such certainty that the defendant must know what judgment is meant.³⁰ It is not necessary to aver that execution was not issued within a year and a day; that the judgment remains unpaid and unsatisfied is a sufficient allegation.³¹ So a writ of *scire facias*, in reciting a judgment on a *prior scire facias*, need not recite the amount for which such judgment was obtained; such a recital is in no respect uncertain, informal, or insufficient, when the writ recites the judgment on the *prior scire facias* as it would be set out in the full and formal record of that judgment.³² So a *scire facias* against

²⁵ *Pennock v. Hart*, 8 Serg. & R. 369.

²⁶ *Penna. Act*, Mar. 26, 1837.

²⁷ *Blake v. Dodemead*, 2 Strange, 775; *Bank of Scotland v. Fenwick*, 1 Ex. 792; *Nunn v. Claxton*, 3 Ex. 712; *Prather v. Manro*, 11 Gill & J. 261; *Bowie v. Neale*, 41 Md. 124; *Bish v. Williar*, 59 Md. 382; *McVeigh v. Bank of Old Dominion*, 76 Va. 267; *Brown v. Harley*, 2 Fla. 159; *Hopkins v. Howard*, 12 Tex. 7; *State v. Robinson*, 8 Yerg. 370; *Calhoun v. Adams*, 43 Ark. 238; *Farris v. People*, 58

Ill. 26; *Merchants' Mut. Ins. Co. v. Hill*, 17 Mo. App. 590; *Foster on Scire Facias*, 349.

²⁸ *McKinney v. Mehaffey*, 7 Watts & S. 276.

²⁹ *Richter v. Cummings*, 60 Pa. St. 441; *Wolf v. Poundsford*, 4 Ohio, 397; *Warfield v. Brewer*, 4 Gill, 265.

³⁰ *Ward v. Prather*, 1 J. J. Mar. 4.

³¹ *Albin v. People*, 46 Ill. 372.

³² *Brown v. Chesapeake & Ohio Canal Co.*, 4 Fed. Rep. 770.

the heir, on a judgment recovered against the ancestor, need not aver ineffectual proceedings against the personal representatives; but if no such proceedings have been had, such defense must be set up by plea.³³ But on the other hand, a writ of *scire facias* to enforce a judgment rendered against a trustee is insufficient if it be only alleged therein that the plaintiff recovered a judgment against the defendant as trustee. It should appear for what the trustee was made chargeable.³⁴ A substantial variance between the recitals in the writ of *scire facias* and the judgment to be revived would break the continuity of the lien; but if the objection be formal and technical only, it will not affect the lien of the original.³⁵

§ 487. Service of Writ.

At common law, the rule is that two returns of *nihil* to a writ of *scire facias* are equivalent to a return of *scire feci*; that is, the court thereupon acquires jurisdiction of the defendant and may proceed to award execution on the original judgment.³⁶ But here an important distinction is recognized, viz., that if execution is awarded upon a return of *scire feci*, the defendant is concluded by the judgment; but when it is awarded upon two returns of *nihil*, the defendant may afterwards present his defense by *audita querela*, or upon motion to the court, and may have the full benefit thereof.³⁷ The common law rule is still adhered to in some of the states. According to the opinion of the supreme court of Massachusetts, if the law prescribes no particular form of notice to be given to a defendant beyond the jurisdiction of the court, it is for the court to cause such notice to be given to him as shall be reasonable and enable him to appear and defend

³³ *Rogers v. Denham*, 2 Gratt. 200.

³⁴ *Gibson v. Davis*, 23 Vt. 374.

³⁵ *Dougherty's Estate*, 9 Watts & S. 189, 42 Am. Dec. 826.

³⁶ *Randal v. Wale*, Cro. Jac. 59; *Barret v. Cleydon*, Dyer, 168; *Bromley v. Littleton*, Yelv. 112; *Andrews v. Harper*, 8 Mod. 227; *Warder v. Tainter*, 4 Watts, 270; *Chambers v. Carson*, 2

Whart. 9; *Cumming v. Eden*, 1 Cow. 70; *Woodfork v. Bromfield*, 1 Murph. 187; *Ingram v. Belk*, 2 Strobb. 207, 47 Am. Dec. 591; *Barrow v. Bailey*, 5 Fla. 9; *Dunlevy v. Ross*, Wright, 287; *Sans v. People*, 8 Gilm. 327; *Choate v. People*, 19 Ill. 68.

³⁷ *Barrow v. Bailey*, 5 Fla. 9; *Fitz. Nat. Brev.* 104.

his rights.³⁸ In some other states it is held that the writ of *scire facias* must be served personally.³⁹ In cases where there is a terre-tenant of the land, he must also be served with process; yet if he appears and confesses judgment on the *scire facias*, he thereby waives the objection that he was not served.⁴⁰ The question, who are to be considered terre-tenants in such sense as to require a service of the writ upon them in order to continue the lien of the judgment, will be examined in a later section. In Pennsylvania it is held that service is good when made on the defendant, who remains in the possession of his real estate, although he has made an assignment for the benefit of his creditors.⁴¹

§ 488. Parties Plaintiff.

The plaintiff in a *scire facias* will ordinarily be the same person who was plaintiff in the original judgment, and in such case his capacity to sue out the writ will be governed by the same rules which determine the capacity of persons to maintain other species of actions. Thus, a married woman may bring a *scire facias* to continue the lien of a judgment against her husband, the judgment having been entered in her favor before they were married.⁴² When the writ is used to revive a judgment in favor of an intestate, it should be issued in the name of his administrator; but if issued in the name of the intestate, it may be amended by substituting that of the administrator.⁴³ Where the judgment has passed by assignment to a third person, the determination of the proper plaintiff in an action to revive it will depend upon the statutory rules in the particular jurisdiction. If the law requires all suits to be brought in the name of "the real party in interest," the *scire facias* should be sued out in the name of the assignee. If, however, such a provision does not exist, a suit to revive a judgment is properly brought in the name of the original plaintiff, even though the judgment may have become

³⁸ Comstock v. Holbrook, 16 Gray, 111.

³⁹ McCombs v. Feeter, 1 Wend. 19;
Rice v. Talmadge, 20 Vt. 378.

⁴⁰ Dickerson's Appeal, 7 Pa. St. 255.

⁴¹ *In re Dohner*, 1 Pa. St. 101.

⁴² Kinkade v. Cunningham, 118 Pa. St.
501, 12 Atl. Rep. 410.

⁴³ Challenor v. Niles, 78 Ill. 78.

the property of a third person.⁴⁴ In Michigan, where the statute allowing an assignee to pursue remedies in his own name is permissive only, it is held that *scire facias* may be prosecuted by the assignee of a judgment in the name of the assignor, where he alleges a *bona fide* assignment, and also that there is a sum unpaid on the execution rightfully belonging to the assignee.⁴⁵

§ 489. Parties Defendant.

The general rule is that "all the parties to the original judgment must be parties to the proceedings to renew or revive that judgment."⁴⁶ It is also a rule that all persons must be joined who have a substantial interest in the land to be bound by the lien. But the failure to make a naked trustee, who has no beneficial interest in the land, a party to a writ issued for the revival of the judgment, will not destroy the hold of the judgment on a *cestui que trust* who is duly joined.⁴⁷ In a recent case in the United States circuit court for the western district of Tennessee, the question was on a *scire facias* to revive a judgment against the old corporation of the city of Memphis. It appeared that the legislature had abolished the charter of that city and organized the same inhabitants and territory into a municipal corporation by another name, and the supreme court of the state had construed the legislation as creating a successor to the old corporation liable for its debts. It was therefore adjudged that *scire facias* was the proper remedy to revive a judgment existing against the old corporation at the time of the repeal of the charter, against the new corporation; and the fact that the assets of the extinct municipality were undergoing administration in a court of equity under regulations prescribed by the legislature did not defeat the plaintiff's right to a revivor, nor the fact that there was no property liable to execution in the hands of the new corporation.⁴⁸ A number of judgments against the same person may be consolidated and revived in one

⁴⁴ *Marbury v. Pace*, 30 La. Ann. 1380.

⁴⁷ *Bowers v. Harner*, 3 Phila. 146.

⁴⁵ *McRoberts v. Lyon* (Mich.), 44 N. W. Rep. 160.

⁴⁸ *Grantland v. Memphis*, 12 Fed. Rep. 287.

⁴⁶ *Funderburk v. Smith*, 74 Ga. 515.

amicable action of *scire facias*, although one of them is also against another defendant, and, when so revived, the continuity of the liens is preserved.⁴⁹

§ 490. Same; Judgment against Decedent.

Scire facias is the proper remedy to revive a judgment against an ancestor so as to compel the heirs at law to satisfy it out of lands inherited by them.⁵⁰ But as to the proper persons to be made defendants to a revival of this sort, there is the greatest diversity of practice in the different states. In some jurisdictions the rule obtains that it is not necessary to make the executors or administrators of a deceased defendant parties to the writ, the subject-matter in dispute being beyond their province, but that the heirs and terre-tenants must be joined.⁵¹ In Pennsylvania, on the other hand, it is established law that where a judgment has been obtained against a man in his lifetime, it may be revived after his death, for the purpose of lien and execution, by a *scire facias* issued against his personal representatives alone, and in such case it is unnecessary to bring in the widow and heirs by a writ against them.⁵² And conversely it is held, in the same state, that under these circumstances, if the writ be sued only against the heirs in possession of the inheritance, it is erroneous; the executor or administrator *must* be made a party to it.⁵³ In Indiana, it is said that the administrator and heirs of a decedent are properly joined as defendants in a proceeding to revive a judgment against him.⁵⁴ It is to be remarked that a *scire facias* against the heirs and terre-tenants of the judgment-debtor will not reach property never owned by such debtor, but inherited by his children after his death from a third person.⁵⁵

⁴⁹ Yeager's Appeal (Pa.), 18 Atl. Rep. 187.

⁵⁰ Bank v. Kendall, 21 Miss. 278.

⁵¹ Tessier v. Wyse, 8 Bland, 40; Walden v. Craig, 14 Pet. 147.

⁵² Middleton v. Middleton, 106 Pa. St. 252; Grover v. Boon, 124 Pa. St. 399, 16

Atl. Rep. 885; McMillan v. Red, 4 Watts & S. 287.

⁵³ Brown v. Webb, 1 Watts, 411.

⁵⁴ Graves v. Skeels, 6 Ind. 107.

⁵⁵ Adams v. Stake, 67 Md. 447, 10 Atl. Rep. 444.

§ 491. Same; Joint Defendants.

In case the judgment sought to be revived was rendered against two or more joint defendants, it is a practically universal rule that the *scire facias* must follow the judgment, and all the original defendants must be made defendants to the writ, if living; if one has died, the writ must be against the survivors jointly with the heirs and terre-tenants of the decedent (or his personal representative in proper cases); and it is irregular to take proceedings against the surviving defendants alone, or against the representatives of the decedent without joining the survivors.⁶⁶ Hence, where a plaintiff for any sufficient cause desires to revive a judgment against one or more of several defendants without joining all, his remedy is by an action of debt on the judgment; it cannot be done by *scire facias*.⁶⁷ So where a writ to revive a judgment against several is not served on one of them, the plaintiff cannot discontinue the proceeding as to him and revive the judgment against the others.⁶⁸

§ 492. Terre-Tenants.

A terre-tenant, in the sense in which the term is used in connection with the subject-matter now under consideration, is one who has an estate in the land, coupled with the actual possession, which he derived mediately or immediately from the judgment-debtor while the land was bound by the lien. And the rule is, that on a *scire facias* to revive the lien of a judgment on land which is in the possession of a terre-tenant, it is essential that the terre-tenant be made a party to the proceedings.⁶⁹ In Pennsylvania, however, under the wording

⁶⁶ *Sainsbury v. Pringle*, 10 B. & C. 751; *Fowler v. Rickerly*, 9 Dowl. P. C. 682; *Panton v. Hall*, Salk. 598; *Rex v. Chapman*, 8 Anst. 811; *Grenell v. Sharp*, 4 Whart. 844; *Commonwealth v. Mateer*, 16 Serg. & R. 416; *Dowling v. McGregor*, 91 Pa. St. 410; *McAfee v. Patterson*, 2 Sm. & Mar. 598; *Henderson v. Vanhook*, 24 Tex. 858; *Bolinger v. Fowler*, 14 Ark. 27; *Calloway v. Eubank*, 4 J. J.

Mar. 280; *Gray v. McDowell*, 5 T. B. Mon. 501; *Murray v. Baker*, 5 B. Mon. 172; *Huey v. Redden*, 8 Dana, 488; *Mitchell v. Smith*, 1 Litt. 248; *Foster on Scire Facias*, 20, 21.

⁶⁷ *Carson v. Moore*, 23 Tex. 450.

⁶⁸ *Greer v. State Bank*, 10 Ark. 455; *Coleman v. Edwards*, 2 Bibb, 595. Compare *Hanson v. Jacks*, 22 Ala. 549.

⁶⁹ *Lusk v. Davidson*, 8 Pen. & W. 220;

of the statute, it has been decided that the *issuing* of a *scire facias* within five years after the judgment was rendered continues the lien on lands that had been conveyed by the defendant, although no *service* of the writ is actually made on the terre-tenant.⁶⁰ In the same state the statutes provide two modes of reviving a judgment, (1) by agreement between the parties and terre-tenants, (2) by a writ of *scire facias*. And it is held that a revival by agreement with the judgment-debtor alone does not continue the lien, as against the terre-tenants, after the expiration of the statutory period.⁶¹ But, on the other hand, an amicable revival of the judgment by the terre-tenant, by an agreement to which the defendant is not a party, will continue the lien of the judgment on the land.⁶² And if the writ is served upon the terre-tenant, it matters not that judgment is not formally entered against him on the *scire facias*.⁶³

As to who are to be considered terre-tenants, the authorities are in the main harmonious, the definition given at the beginning of this section exhibiting the substantial result of the various rulings. And first, the party must have a substantial interest or estate in the land. Thus, a mere occupant, holding in the character of a yearly lessee of the defendant, need not be made a party to the writ.⁶⁴ So an assignee for the benefit of creditors is not a purchaser; he is a mere volunteer standing in the place of the assignor, and, as a general rule, has no rights against the lien-creditors of the assignor which the latter did not himself have.⁶⁵ Secondly, the person to be bound as terre-tenant must derive his title from the judgment-debtor. "Where a party is in possession holding title adverse to that of the defendant, or paramount to his, such party is not a terre-tenant within the

McCrary v. Clark, 82 Pa. St. 457; Morton v. Croghan, 20 Johns. 106; Von Puhl v. Rucker, 6 Iowa, 187. In Pennsylvania, under the act of Apr. 16, 1849, the terre-tenant is not entitled to notice of the revival of a judgment as between the original parties, unless he has, at the time of such revival, recorded his deed or taken such possession of the land as amounts to constructive notice to the judgment creditor. Buck's Appeal, 100 Pa. St. 109.

⁶⁰ Meinweiser v. Hains, 110 Pa. St. 468, 2 Atl. Rep. 481.

⁶¹ Baum v. Custer (Pa.), 18 Atl. Rep. 771; Armstrong's Appeal, 5 Watts & S. 852.

⁶² Sames's Appeal, 26 Pa. St. 184.

⁶³ Day v. Willy, 8 Brewst. 48.

⁶⁴ Clippinger v. Miller, 1 Pen. & W. 64.

⁶⁵ Kepler v. Erie Savings Co., 101 Pa. St. 602.

meaning of the law, because his rights are in no manner affected by the judgment. If he has a good title, the judgment does not bind his land, nor can a sale under the execution affect his interest. One who purchased the lands at a tax sale, and went into possession, is not a terre-tenant. If the sale was valid, the purchaser held a title paramount to the judgment, and not to be affected by the proceedings under the execution. If the sale was invalid, then the purchaser was in possession without title under the judgment-debtor, and not as his terre-tenant."⁶⁶ In the third place, the person designated as terre-tenant must have obtained his title from the judgment-debtor during the time when the land was bound by the lien of the judgment. A purchaser *after the lien has expired* is not a terre-tenant and is not bound by the judgment on the *scire facias*.⁶⁷ The failure of a judgment-creditor to preserve his lien, by neglecting to give the terre-tenant notice of a *scire facias* to revive, will not discharge the liability of a surety on the bond upon which the judgment was entered.⁶⁸

⁶⁶ Polk v. Pendleton, 31 Md. 118.

⁶⁷ Dengler v. Kiehner, 13 Pa. St. 38, 58 Am. Dec. 441. In this case Gibson, C. J., said: "A judgment-creditor has a right to call on a terre-tenant of land, purchased by him from the debtor while it was bound by the judgment, to show why the debt ought not to be levied on it; and the terre-tenant having slept his time, being warned, is concluded as to everything he might have made matter of defense to the *scire facias*. But the creditor must at least have laid a *prima facie* case; he must show that he whom he calls a terre-tenant actually stood in the relation of one, else there will not have been such privity between them as would estop the latter by the judgment. But who is a terre-tenant? Not every one who happens to be in possession of the land. There can be no terre-tenant who is not a purchaser of the estate, mediately or immediately, from the debtor, while it was bound by the judgment; and when he has taken a title thus bound, he must

show how the lien of it has been discharged, whether by payment, release, or efflux of time. These are matters of defense which may be precluded. True, we have a statute which directs notice to be given to occupants, but only to let the lessee of a terre-tenant in to a defense, which his landlord may have neglected to make, for his protection. The facts of this case are, that the estate had been bound by the judgment, but that the lien of it had expired when the ancestor of the plaintiffs purchased it. It had ceased to be a judgment of greater effect against the land than it was against the debtor's chattels, and the purchaser's title was paramount to it. He was not a terre-tenant or the lessee of a terre-tenant, and as he had not a day in court, the judgment, being *inter alios*, was not an estoppel. The case is clearly within the principle of Mitchell v. Hamilton [3 Pa. St. 496], and is ruled by it."

⁶⁸ Kindt's Appeal, 102 Pa. St. 441.

§ 493. Defenses.

On the general principle of *res judicata* (which applies equally to proceedings by *scire facias* as to any other action or suit), and on the further ground that this method of reviving a judgment is merely a supplementary step in the original action, the defendant is absolutely precluded from going behind the judgment and offering in defense to the *scire facias* any matter which existed before the rendition of the original judgment and might have been presented in the former proceeding.⁶⁶ In no case and under no circumstances can the merits of the original judgment be inquired into by the defendant on a writ to revive it. As a rule, therefore, the only allowable pleas to a *scire facias* upon a judgment are (1) *nul tiel record* (under which the defendant may deny the existence of the original judgment or allege that it is entirely void), and (2) payment, including release, satisfaction, or discharge of the original judgment.⁶⁷ Thus the objection that a bond and warrant were usurious cannot be taken to a *scire facias* on the judgment confessed on the warrant.⁷¹ So where the charter of a corporation makes the stockholders personally liable for all debts except loans, and a judgment is obtained against the corporation and a *scire facias* sued out against the stockholders to charge them personally, there are no defenses open to them except (1) that

⁶⁶ *Allens v. Andrews*, Cro. Eliz. 283; *Cook v. Jones*, Cowp. 727; *Thomas v. Williams*, 3 Dowl. P. C. 655; *Baylis v. Hayward*, 4 Ad. & El. 256; *Dickson v. Wilkinson*, 8 How. 57; *United States v. Thompson*, Gilp. 614; *Smith v. Eaton*, 86 Me. 298, 58 Am. Dec. 746; *Springfield Manuf. Co. v. West*, 1 Cush. 388; *Thayer v. Tyler*, 10 Gray, 164; *Sigourney v. Stockwell*, 4 Met. 518; *Stephens v. Howe*, 127 Mass. 164; *Robbins v. Bacon*, 1 Root, 548; *Bradford v. Bradford*, 5 Conn. 127; *McFarland v. Irwin*, 8 Johns. 77; *Cardesa v. Humes*, 5 Serg. & R. 65; *Davidson v. Thornton*, 7 Pa. St. 128; *Carr v. Townsend*, 68 Pa. St. 202; *Weaver v. Wible*, 72 Pa. St. 469; *Pittsburgh, etc., R. Co. v. Marshall*, 85 Pa. St. 187; *Kemp*

v. Cook, 6 Md. 305; *May v. State Bank*, 2 Rob. (Va.) 56, 40 Am. Dec. 726; *Ferebee v. Doxey*, 6 Ired. 448; *Koon v. Ivey*, 8 Rich. 37; *Camp v. Baker*, 40 Ga. 148; *Miller v. Shackelford*, 16 Ala. 95; *Betancourt v. Eberlin*, 71 Ala. 461; *Mathews v. Mosby*, 18 Sm. & Mar. 422; *Anderson v. Williams*, 2 Cush. (Miss.) 684; *Pollard v. Eckford*, 50 Miss. 681; *Baxter v. Dear*, 24 Tex. 17, 76 Am. Dec. 89; *Bell v. Williams*, 4 Sneed, 196; *Love v. Allison*, 2 Tenn. Ch. 111; *Vredenburg v. Snyder*, 6 Iowa, 39; *Walkins v. State*, 7 Mo. 334; *Riley v. McCord*, 24 Mo. 265.

⁷⁰ *Blackburn v. Beall*, 21 Md. 308; *Dowling v. McGregor*, 91 Pa. St. 410; *McCracken v. Swartz*, 5 Oreg. 62.

⁷¹ *Lysle v. Williams*, 15 Serg. & R. 135.

they are not stockholders, or (2) that the debt on which the judgment was founded was for a loan.⁷³ But there may be exceptional cases, in which this rule would not be strictly enforced. Thus, if the defendant dies after verdict and before judgment, and his administrator becomes a party to the suit and judgment passes against him, and execution is issued and returned unsatisfied, then, on *scire facias* against the administrator, he may well plead no assets or insolvency, for he had no time to make such plea in the original suit.⁷³

§ 494. Same; Payment, Release, Set-Off.

We have already seen that the payment, satisfaction, release, or discharge of the original judgment is one of the defenses available in an action by *scire facias* to revive it. It is also held that "accord and satisfaction" is also a proper plea to such an action.⁷⁴ But evidence is not admissible of payment anterior to the rendition of the original judgment.⁷⁵ And so, where a separate judgment has been rendered against one obligor on a joint and several obligation, and a *scire facias* is issued to revive the judgment, the defendant cannot avail himself of a release given to his co-obligor subsequent to the original judgment.⁷⁶ Set-off or counterclaim is in no case available as a defense. Where the defendant offered certain claims against the plaintiff, being unsettled partnership accounts, as a set-off, it was held that they were properly ruled out.⁷⁷ A terre-tenant, but no one else, may also plead that the land is discharged from the lien of the original judgment.⁷⁸

§ 495. Same; Discharge in Bankruptcy.

A discharge in bankruptcy is also a good defense to a *scire facias* to revive a judgment, provided the defendant was so discharged after

⁷³ *Wilson v. Pittsburgh Coal Co.*, 48 Pa. St. 424.

⁷³ *Hatch v. Eustis*, 1 Gallison, 160. And see *Colwell v. Rockwell*, 100 Pa. St. 138.

⁷⁴ *McCullough v. Franklin Coal Co.*, 21 Md. 256.

⁷⁵ *McVeigh v. Little*, 7 Pa. St. 279.

⁷⁶ *United States v. Thompson*, Gilp. 614.

⁷⁷ *Jenkins v. Anderson (Pa.)*, 11 Atl. Rep. 558; *Anderson v. Gage*, Dudley (S. Car.), 819.

⁷⁸ *Silverthorn v. Townshend*, 37 Pa. St. 263.

the rendition of the original judgment; if before, he ought to have pleaded it in the principal suit.⁷⁹ But where a judgment entered before the institution of bankruptcy proceedings is revived by *scire facias*, after the discharge of the bankrupt, upon the land subject to its lien when entered, and so restricted that it can only be enforced on such real estate (and against the proceeds thereof in the hands of a trustee for sale), the defendant is fully protected, and any execution issued on the judgment would be restrained accordingly.⁸⁰ In the case of a *scire facias* to revive a judgment of *revival*, a plea that the defendant was discharged as a bankrupt at a time which was after the original judgment but before the judgment of revival, comes too late and is inadmissible.⁸¹

§ 496. Same; Invalidity of Original Judgment.

Under a plea of *nul tiel record* to a *scire facias* to revive a judgment, the defendant may take advantage of any facts (as total want of jurisdiction) which make the original judgment absolutely *void*; but if the judgment be not absolutely void, the defendant cannot, under this plea, object to mere errors or irregularities.⁸² Thus, the failure to file a complaint in a suit commenced by attachment, although an irregularity for which, on appeal, a judgment by default would be reversed, is no defense to a *scire facias* to revive the judgment recovered in that suit.⁸³ So the defendant is estopped to make the defense that the judgment was rendered against him by default on insufficient service, where he has pleaded the same judgment in bar, on a plea of former recovery, in a subsequent action on the same demand.⁸⁴ The defendant can indeed move to set aside the original judgment because surreptitiously obtained, or the judgment will be opened if given on default in ignorance of the party's rights, or upon

⁷⁹ Spring Run Coal Co. v. Tosier, 103 Pa. St. 342; Stewart v. Colwell, 24 Pa. St. 67; Duncan v. Hargrove, 23 Ala. 150.

⁸⁰ Walters v. Oyster, (Pa.), 1 Atl. Rep. 480.

⁸¹ Stewart v. Colwell, 24 Pa. St. 67.

⁸² Campbell's Appeal, 118 Pa. St. 138, 12 Atl. Rep. 299; Hauer's Appeal, 5

Watts & S. 473; Davidson v. Thornton, 7 Pa. St. 128; Tripp v. Potter, 11 Ired. 121; McFadden v. Lockhart, 7 Tex. 573; Anthony v. Humphries, 9 Ark. 176; Bell v. Williams, 4 Sneed, 196.

⁸³ Betancourt v. Eberlin, 71 Ala. 461.

⁸⁴ Kennedy v. Bambrick, 20 Mo. App. 680.

the showing of a defense which arose afterwards; but otherwise he can only object by showing that the judgment has been paid or never existed.⁸⁵ But judgments which are absolute nullities cannot be revived. They cannot be continued in existence when they never had any life.⁸⁶

§ 497. Same; Collateral Agreements.

It is no defense to the revival of a judgment that the plaintiff had agreed not to issue execution.⁸⁷ And so a verbal assurance by a grantor that a clause in the deed, reserving the lien of a judgment owned by him, should never be enforced, in whole or in part, against the grantee, one of the heirs of the defendant in the judgment, on the ground of which the deed was accepted, is a purely voluntary contract, and void in a *scire facias* for revival against the grantee as an heir.⁸⁸ But on the other hand, under the plea of payment, the defendant may give in evidence that when he executed the bond and warrant upon which the judgment was confessed, the plaintiff promised to cancel it upon an event which has occurred since the judgment.⁸⁹ So an agreement entered into prior to the date of a judgment, as to the mode of its discharge, but which was not to be executed until afterwards, and all payments made in pursuance of such agreement, are admissible in evidence in support of the plea of payment and satisfaction.⁹⁰ Also, the terre-tenant may offer evidence of a collateral agreement between the original parties, the effect of which is not to impair the judgment but to restrict its lien.⁹¹

§ 498. Judgment on Scire Facias.

According to the practice obtaining in a majority of the states, and founded on the view that this species of proceeding is not a new suit but a continuation of the original action, it is error for the court

⁸⁵ Weber v. Detwiller (Pa.), 8 Atl. Rep. 910.

⁸⁶ *In re* Board of Administrators, 87 La. Ann. 916.

⁸⁷ Ladd v. Church, 6 Phila. 591.

⁸⁸ Codding v. Wood, 112 Pa. St. 371, 3 Atl. Rep. 455.

⁸⁹ Hartzell v. Reiss, 1 Binn. 289.

⁹⁰ Downey v. Forrester, 35 Md. 117.

⁹¹ Sankey v. Reed, 12 Pa. St. 95.

to proceed to render a new judgment, on a *scire facias* to revive; the proper entry is, that the plaintiff have execution of the judgment mentioned in the writ and his costs.²² And, since this entry is but a reiteration of the former judgment, and not an independent sentence, it follows that if the original judgment be reversed, a judgment on a *scire facias* to revive it will likewise fall.²³

§ 499. Practice in Pennsylvania.

In the state of Pennsylvania the practice is different from that described in the preceding section. "A judgment regularly revived by *scire facias*," says the supreme court of that state, "is not void even if the original judgment was void. A *scire facias* here is a substitute for an action of debt elsewhere; the judgment on it is *quod recuperet*, instead of a bare award of execution; it therefore warrants the awarding of the execution. The last judgment cannot be considered invalid, although it was entered on a *scire facias* issued on a previous judgment that was void. The new judgment, being regular on its face and voidable only, has a sufficient vitality to support the sale."²⁴ A revival of judgment by amicable *scire facias*, to be valid, and to be notice to subsequent purchasers or subsequent judgment-creditors, must be docketed; it is not sufficient that it be filed among the papers of the original judgment and noted upon the docket entry of such judgment.²⁵

²² *Denegre v. Haun*, 18 Iowa, 240; *Humphreys v. Lundy*, 87 Mo. 820; *Hanley v. Adams*, 15 Ark. 282; *Camp v. Gainer*, 8 Tex. 872; *Murray v. Baker*, 5 B. Mon. 172.

²³ *Mills v. Conner*, 1 Blackf. 7; *Eldred v. Hazlett*, 38 Pa. St. 16.

²⁴ *Duff v. Wyncoop*, 74 Pa. St. 300; *Buehler v. Buffington*, 48 Pa. St. 278; *Custer v. Detterer*, 8 Watts & S. 28.

²⁵ *McCleary's Appeal*, 1 Watts & S. 299.

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